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AFTER-ACQUIRED TITLE IN TEXAS*

by

*Richard W. Hemingway***

PART ONE

- I. Introduction and Scope of Article
- II. Antecedents
 - A. Early Texas Cases and Common Law Roots
 - B. Coke's Warranty
 - 1. Pre-Norman Mists
 - 2. Feudal Relationships and the Common Law Warranty
 - C. The Covenant of Warranty
 - 1. England
 - 2. United States
 - D. The Common Law Warranty as a Basis for Passing After-Acquired Title
 - E. Covenants of Title as a Basis for Passing After-Acquired Title
 - 1. The Covenant of Seisin
 - 2. The Covenant of Further Assurance
 - 3. The Covenant of Quiet Enjoyment
 - 4. The Covenant of Warranty
 - F. Estoppel as a Basis for Passing After-Acquired Title
 - 1. Early Texas Cases
 - 2. Form of Deed or Other Instrument
 - a. Quitclaim Deed
 - b. Effect of Recitals
 - G. Remote Grantees
- III. After-Acquired Title and the Texas Recording Acts
 - A. Operation of the Recording Acts
 - B. The Scope of Search Doctrine as Limiting the Effect of the Recording Acts
 - C. Breen v. Morehead and Progeny

PART TWO

IV. After-Acquired Title and Particular Situations

* This is Part One of an Article to be presented in two parts. Part Two will appear in a forthcoming issue.

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- A. Marital Property
 - 1. Homestead Property
 - 2. Wife's Separate Property
- B. Lienholders and Creditors
 - 1. Mortgagees and After-Acquired Property
 - 2. Creditors of the Grantor
- C. Mineral Conveyances and Oil and Gas Leases—Duhig and Progeny
- D. Grantors in a Representative Capacity
- E. Grantees from Persons Without Title
 - 1. Green v. White
 - 2. Adverse Possession
- F. Miscellaneous
- V. Conclusion

PART ONE

"It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, *THE PATH OF THE LAW* (1897).

I. INTRODUCTION AND SCOPE OF ARTICLE

The so-called "doctrine of after-acquired title" deals with the rights of a grantee (and his successors) who accepts a deed or other conveyance from a grantor then without title, but who thereafter acquires it. The problem asserts itself in many areas of the law: mortgages and other voluntary liens on real property, conveyances and voluntary liens by a married woman of her separate property, conveyances and liens on the homestead community property by the husband, rights of adverse possessors claiming through deeds, rights of creditors of the grantor, and the interrelation of rights of a purchaser as affected by the recording acts.¹

¹ (a) *Mortgages and voluntary liens*: Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270 (1942); Willis v. Smith, 72 Tex. 565 (1889); Galloway v. Mosser, 82 S.W.2d 1067 (Tex. Civ. App. 1935); Shamburger Lumber Co. v. Bredthaver, 62 S.W.2d 603 (Tex. Civ. App. 1933); Dearing v. Jordan, 130 S.W. 876 (Tex. Civ. App. 1910) *error disp.*; Anderson v. Casey-Swasey Co., 120 S.W. 918 (Tex. Civ. App. 1909), *rev'd on other grounds*, 103 Tex. 466, 129 S.W. 349 (1910); Masterson v. Burnett, 66 S.W. 90 (Tex. Civ. App. 1901) *error ref.* (b) *Husband and wife, community and separate property—conveyances and voluntary liens*: Irion v. Mills, 41 Tex. 310 (1874); Dearing v. Jordan, 130 S.W. 876 (Tex. Civ. App. 1910) *error disp.*; Marble v. Marble, 114 S.W. 871 (Tex. Civ. App. 1908); Wooten v. Pennock, 114 S.W. 465 (Tex. Civ. App. 1908); Colonial & United States Mortg. Co. v. Thetford, 66 S.W. 103 (Tex. Civ. App. 1901); Stallings v. Hullum, 33 S.W. 1033

Consider the following: O conveys Blackacre to A by warranty deed at a time when O has no title. Subsequent to the conveyance, O acquires title. Although the Texas courts generally have held that A can acquire O's after-required title and is not limited to damages in a suit for breach of warranty, a study of the cases will demonstrate a wide variation by the courts in their definition and consistency of application of the rationale used to determine the rights of competing parties to an after-acquired title:

1. A is given title on the basis of a covenant of warranty contained in the deed (express or implied) to prevent a circuitry of action on the covenant (hereinafter referred to as the "warranty cases").²

2. A is given title on the basis that O is estopped to deny the title he purported to convey to A (hereinafter referred to as the "estoppel cases").³

(Tex. Civ. App. 1895); Wadkins v. Watson, 21 S.W. 636, *rev'd*, 86 Tex. 194, 24 S.W. 385 (1893); Randolph v. Junker, 21 S.W. 551 (Tex. Civ. App. 1892). (c) *Rights of creditors*: Taylor v. Huck & Co., 65 Tex. 238 (1885); Ackerman v. Smiley, 37 Tex. 211 (1872); Newton v. Easterwood, 154 S.W. 646 (Tex. Civ. App. 1913) *error ref.*; Anderson v. Casey-Swasey Co., 120 S.W. 918 (Tex. Civ. App. 1909) *rev'd on other grounds*, 103 Tex. 446, 129 S.W. 349 (1910); Masterson v. Burnett, 66 S.W. 90 (Tex. Civ. App. 1901), *error ref.*; Hale v. Hollon, 35 S.W. 843 (Tex. Civ. App. 1896), *rehearing denied*, 36 S.W. 288 (Tex. Civ. App. 1896), *aff'd*, 90 Tex. 427, 39 S.W. 287 (1897). (d) *Adverse possessors*: Houston Oil Co. v. Moss, 155 Tex. 157, 284 S.W.2d 131 (1955); Adams v. Duncan, 147 Tex. 332, 215 S.W.2d 599 (1948); Greene v. White, 137 Tex. 361, 153 S.W.2d 575 (1941); Thomas v. Southwestern Settlement & Dev. Co., 131 S.W.2d 31 (Tex. Civ. App. 1939) *error dism., judgm. cor.* (e) *Effect of recording acts*: Benge v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166 (1953); Caswell v. Llano Oil Co., 120 Tex. 139, 36 S.W.2d 208 (1931); Williams v. Cook, 282 S.W. 574 (Tex. Comm. App. 1926); Leonard v. Benford Lumber Co., 110 Tex. 83, 216 S.W. 382 (1919); Breen v. Moorehead, 126 S.W. 650 (Tex. Civ. App. 1910), *aff'd*, 104 Tex. 254, 136 S.W. 1047 (1911); Simon v. Stearns, 43 S.W. 50 (Tex. Civ. App. 1897) *error ref.*; Hale v. Hollon, 36 S.W. 288 (Tex. Civ. App. 1896), *aff'd*, 90 Tex. 427, 39 S.W. 287 (1897).

²McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341 (1957); Gibson v. Turner, 156 Tex. 289, 294 S.W.2d 781 (1956); Benge v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166 (1953); Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 144 S.W.2d 878 (1940); Barroum v. Culmell, 90 Tex. 93, 37 S.W. 313 (1896); Wadkins v. Watson, 86 Tex. 194, 24 S.W. 385 (1893); Richardson v. Powell, 83 Tex. 588, 19 S.W. 262 (1892); Fretelliere v. Hindes, 57 Tex. 392 (1882); Harrison v. Boring, 44 Tex. 255 (1875); Ackerman v. Smiley, 37 Tex. 211 (1872); Gould v. West, 32 Tex. 339 (1869); Brateman v. Upper Channel Site Co., 378 S.W.2d 882 (Tex. Civ. App. 1964) *error ref. n.r.e.*; Seydler v. Herder, 361 S.W.2d 411 (Tex. Civ. App. 1961) *error ref. n.r.e.*; Farmers Royalty Holding Co. v. Hahn, 187 S.W.2d 930 (Tex. Civ. App. 1945), *aff'd*, 144 Tex. 312, 190 S.W.2d 60 (1945); Talley v. Howsley, 170 S.W.2d 240 (Tex. Civ. App. 1943), *aff'd*, 142 Tex. 81, 176 S.W.2d 158 (1943); Wilson v. Wilson, 118 S.W.2d 403 (Tex. Civ. App. 1938); Robinson v. Jacobs, 241 S.W. 241 (Tex. Civ. App.), *aff'd*, 113 Tex. 231, 254 S.W. 309 (1923); Green v. West Texas Coal Mining & Dev. Co., 225 S.W. 548 (Tex. Civ. App. 1920) *error ref.*; Zarate v. Villareal, 155 S.W. 328 (Tex. Civ. App. 1913) *error ref.*; Dearing v. Jordan, 130 S.W. 876 (Tex. Civ. App. 1910) *error dism.*; Frey v. Meyers, 113 S.W. 592 (Tex. Civ. App. 1908).

³Sharpe v. Fowler, 151 Tex. 490, 252 S.W.2d 153 (1952); Adams v. Duncan, 147 Tex. 332, 215 S.W.2d 599 (1948); Talley v. Howsley, 142 Tex. 81, 176 S.W.2d 158 (1943); Lindsay v. Freeman, 83 Tex. 259, 18 S.W. 727 (1892); Willis v. Smith, 72 Tex. 565 (1889); Parker v. Campbell, 21 Tex. 763 (1858); Box v. Lawrence, 14 Tex. 545 (1855); Wilson v. Beck, 286 S.W. 315 (Tex. Civ. App. 1926) *error ref.*; Donnell v. Otts,

3. A is given title on the basis of an estoppel against O created by the presence of a covenant of warranty (express or implied) contained in the deed (hereinafter referred to as the "warranty-estoppel" cases).⁴

4. A is given title where it is difficult, if not impossible, to determine the underlying theory of the case. Unfortunately, this category includes several of the most extensively cited cases in this field.⁵

Seemingly the Texas courts have felt free to apply a "grab-bag" rationale, *i.e.*, a theoretical basis suited to the achievement of a just result in a particular case.⁶ However, this variation as to the basis of

230 S.W. 864 (Tex. Civ. App. 1921); Pritchard v. Fox, 154 S.W. 1058 (Tex. Civ. App. 1913); Anderson v. Casey-Swasey Co., 120 S.W. 918 (Tex. Civ. App. 1909), *rev'd on other grounds*, 103 Tex. 466, 129 S.W. 349 (1910); Lowry v. Carter, 102 S.W. 930 (Tex. Civ. App. 1907) *error ref.*; Scates v. Fohn, 59 S.W. 837 (Tex. Civ. App. 1900); Garrett v. McClain, 44 S.W. 47 (Tex. Civ. App. 1898); Dupree v. Frank, 39 S.W. 988 (Tex. Civ. App. 1897); Randolph v. Junker, 21 S.W. 551 (Tex. Civ. App. 1892).

⁴ Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270 (1942); Harne v. Smith, 79 Tex. 310, 15 S.W. 240 (1891); Wilson v. Wilson, 118 S.W.2d 403 (Tex. Civ. App. 1938); Robinson v. Jacobs, 241 S.W. 241 (Tex. Civ. App. 1923), *aff'd*, 113 Tex. 231, 254 S.W. 309 (1923); Dearing v. Jordan, 130 S.W. 876 (Tex. Civ. App. 1910) *error dism.*; Frey v. Myers, 113 S.W. 592 (Tex. Civ. App. 1908); Morris v. Housley, 34 S.W. 659 (Tex. Civ. App. 1896); Jenkins v. Adcock, 27 S.W. 21 (Tex. Civ. App. 1893).

⁵ Burns v. Goodrich, 392 S.W.2d 689 (Tex. 1965); Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270 (1942); Baldwin v. Root, 90 Tex. 546, 40 S.W. 3 (1897) (a much-cited case); Robinson v. Douthit, 64 Tex. 101 (1885); Harrison v. Boring, 44 Tex. 255 (1875); Ackerman v. Smiley, 37 Tex. 211 (1872); Gould v. West, 32 Tex. 339 (1869); Texas Pacific Coal & Oil Co. v. Fox, 228 S.W. 1021 (Tex. Civ. App. 1921); Breen v. Moorehead, 126 S.W. 650 (Tex. Civ. App. 1910), *aff'd*, 104 Tex. 254, 136 S.W. 1047 (1911); Lowry v. Carter, 102 S.W. 930 (Tex. Civ. App. 1907) *error ref.*; Dupree v. Frank, 39 S.W. 994 (Tex. Civ. App. 1897). For an illustrative example of costly litigation and even more costly consequences, see the series of confusing and not necessarily instructive cases in the oil and gas field, beginning with Duhig v. Peavy-Moore Lumber Co., 135 Tex. 508, 144 S.W.2d 878 (1940), followed by Benge v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166 (1953); Gibson v. Turner, 156 Tex. 289, 294 S.W.2d 781 (1956); and culminating with McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341 (1957).

⁶ For instance compare the opinion of the court in Gould v. West, 32 Tex. 339 (1869) with Lindsey v. Freeman, 83 Tex. 259, 18 S.W. 727 (1892). Wadkins v. Watson, 86 Tex. 194, 24 S.W. 386 (1893); Duhig v. Peavy-Moore Lumber Co., 135 Tex. 508, 144 S.W.2d 878 (1940); and McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341 (1957).

It would seem that A's rights as to O's later acquired title could differ, depending upon the theoretical approach of the court. For example, if A's right is contractual in nature, based upon a breach of a covenant of warranty: (a) A's cause of action would be one of specific performance against O to acquire the legal title. Prior to judgment would O's creditors without notice be able to reach Blackacre? It would also seem that A's cause of action would be barred under the four-year statute, TEX. REV. CIV. STAT. ANN. articles 5529, 5531. As to equitable rights, see Deaton v. Rush, 113 Tex. 176, 252 S.W. 1025 (1923). Virtually all warranty cases state title passes "eo instante" or ignore the problem. See Baldwin v. Root, 90 Tex. 546, 40 S.W. 3 (1897); Gould v. West, 32 Tex. 339 (1869); Caswell v. Llano Oil Co., 120 Tex. 139, 36 S.W.2d 208 (1931); Texas Pacific Coal & Oil Co. v. Fox, 228 S.W. 1021 (Tex. Civ. App. 1921); Newton v. Easterwood, 154 S.W. 646 (Tex. Civ. App. 1913) *error ref.*; Lowry v. Carter, 102 S.W. 930 (Tex. Civ. App. 1907) *error ref.*; (b) A would have no right where a cause of action for breach of warranty did not exist. But see Robinson v. Douthit, 64 Tex. 101 (1885); Gibson v. Turner, 156 Tex. 289, 294 S.W.2d 781 (1956), where after-acquired title passed to the grantee on the theory of covenant of warranty where no consideration was paid or substantial breach of covenant warranty existed; and Morris v. Short, 151 S.W. 633 (Tex. Civ. App. 1912). However, in Fretelliere v. Hindes, 57 Tex. 392 (1882), a release of warranty destroyed grantee's right to after-

decision is also due, in part, to the paucity of source law available to the courts during the Republic and early years of statehood,⁷ and misconceptions concerning the historical basis for acquisition of after-acquired title as it existed in England prior to the colonization of the United States.

II. ANTECEDENTS

A. Early Texas Cases And Common Law Roots

The earliest Texas case found by the author stating that after-acquired title will inure to the benefit of a vendee is *Mays v. Lewis*,⁸ decided in 1849. No supporting authorities are cited by the court. By 1892 the Texas courts had delivered at least twelve opinions concerning after-acquired title in a variety of situations where the basis for the decision was neither mentioned nor discussed.⁹

acquired title. (c) A would have no right where the deed through which he claimed was without covenants, express or implied. *But see* *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727 (1892); *Garrett v. McClain*, 44 S.W. 47 (Tex. Civ. App. 1898); *Dupree v. Frank*, 39 S.W. 994 (Tex. Civ. App. 1894); where after-acquired title passed under deed without warranty. (d) The rights of A's assigns would depend upon the assignability of a chose in action, *i.e.*, the right to enforce a breach of covenant of warranty.

On the other hand, if A's right is based upon an estoppel of O to deny the statements contained in his deed that title had passed to A: (a) A would be automatically vested with O's legal title and could enforce his title by suit in trespass to try title, being limited only by the three, five, ten and twenty-five-year statutes pertaining to adverse possession of land, TEX. REV. CIV. STAT. ANN. arts. 5507, 5509, 5510, 5519 and 5519a. (b) It should be immaterial that no covenant was contained in the conveyance, that no cause of action for breach of warranty existed, and that no consideration was paid. (c) However, knowledge of the outstanding title by the grantee might prevent estoppel from arising. *But see* *Gould v. West*, 32 Tex. 339 (1869); *Surtees v. Hobson*, 4 S.W.2d 245 (Tex. Civ. App. 1928), apparently to the effect knowledge of the grantee will not prevent the estoppel.

⁷ Of some sixteen cases decided by the Texas courts prior to *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727 (1892), the court there cited only the following cases from other jurisdictions (the United States, seven states, and England): *Irvine v. Irvine*, 76 U.S. (9 Wall.) 617 (1869); *French v. Spencer*, 62 U.S. (21 How.) 228 (1858); *Van Rensselaer v. Kearney*, 52 U.S. (11 How.) 325 (1850); *Bush v. Marshall*, 47 U.S. (6 How.) 284 (1848); *Carver v. Jackson*, 29 U.S. (4 Pet.) 1 (1830); *Mitchell v. Winslow*, 17 Fed. Cas. 527 (1843); *Tremble v. State*, 4 Blackf. 437 (Ind. 1837); *Logan v. Steele's Heirs*, 4 B. Mon. 433 (Ky. 1827); *Cutler v. Dickinson*, 8 Pick. 386 (Mass. 1829); *Chapman v. Searle*, 3 Pick. 38 (Mass. 1825); *Nixon's Heirs v. Carco's Heirs*, 28 Miss. 414 (1854); *Wark v. Willard*, 13 N.H. 389 (1843); *Jackson v. Parkhurst*, 9 Wend. 209 (N.Y. 1832); *Jackson v. Winslow*, 9 Cow. 13 (N.Y. 1828); *McWilliams v. Nisly*, 2 S. & R. 507 (Pa. 1816); *Bonner v. Wilkinson*, 106 Eng. Rep. 1340 (1822). Few of the cases are in point concerning after-acquired title, most dealing with estoppel by receipts and recitals.

Of these cases only *Van Rensselaer v. Kearney* is of substance. It is a landmark case on after-acquired title and although cited twice by Texas courts, it was virtually ignored until *Lindsay v. Freeman* in 1892.

⁸ 4 Tex. 38 (1849). Also see *Langford v. Republic*, Dallas, Texas Reports 588 (1844).

⁹ *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727 (1892); *Willis v. Smith*, 72 Tex. 565 (1889); *Taylor v. Huck & Co.*, 65 Tex. 238 (1885); *Robinson v. Douthit*, 64 Tex. 101 (1885); *Fretelliere v. Hindes*, 57 Tex. 392 (1882); *Pitman v. Henry*, 50 Tex. 357 (1878); *Harrison v. Boring*, 44 Tex. 255 (1875); *Ackerman v. Smiley*, 37 Tex. 211 (1872); *Gould v. West*, 32 Tex. 339 (1869); *Parker v. Campbell*, 21 Tex. 763 (1858); *Box v. Lawrence*, 14 Tex. 545 (1855); and *Mays v. Lewis*, 4 Tex. 38 (1849).

It is interesting to note that three were warranty cases: *Ackerman v. Smiley*, *Pitman v.*

These early Texas cases contain few citations to other jurisdictions.¹⁰ No citations are found to Spanish or Mexican authorities,¹¹ and the only English case noted does not deal with an after-acquired title.¹² In the cases by the Texas courts only two references are found to English law.¹³ One significant reference is to Coke on Littleton:¹⁴

Litt. Sect. 446.

Also, these words which are commonly put in such Releases, s. (quae quovismodo in futurum habere potero) are as voide in Law; for no right passeth by a Release, but the right which the Releasor hath at the time of the Release made. For if there be Father and Sonne, and the Father bee disseised, and the Sonne (living his Father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warrantie, &c. and after the Father dieth, &c. the Sonne may lawfully enter upon the possession of the Disseisor, for that hee had no right in the land in his father's life, but the right descended to him after the Release made by the death of his Father, &c. . . .

Coke's Comment on Sect. 446.

Sans clause de garrantie. For if there been a warrantie annexed to the Release, then the Son shall be barred. For albeit the Release cannot barre the right for the cause aforesaid, yet the warrantie may rebutt, and barre him and his heires of a future right which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warrantie being a Covenant reall should barre a future right, is for avoiding a circuitie of action (which is not favoured in Law); as he that made the warrantie should recover the Land against the ter-Tenant, and he by force of the warrantie to have as much in value against the same person: yet is there a diversity betweene a Warrantie and a Feoffment; for if there be Grandfather, Father, and Son, and the Father dis-

Henry, Fretelliere v. Hindes, four were estoppel cases: Box v. Lawrence, Parker v. Campbell, Willis v. Smith, Lindsay v. Freeman; three were of uncertain rationale: Gould v. West, Harrison v. Boring, Robinson v. Douthit; and two were bare of rationale or citation of authorities: Lewis v. Mays, and Taylor v. Huck. In only four of the cases did the courts attempt serious explanation of the basis for decision: *Gould, Harrison, Douthit and Lindsay*. All four have been cited repeatedly; unfortunately, however, in the first three the court showed much uncertainty.

¹⁰ See cases cited note 7 *supra*.

¹¹ It appears that the only action for failure to deliver the title contracted for was in damages: See SCHMIDT, *THE CIVIL LAW OF SPAIN AND MEXICO* art. 608-14, at 133 (1851); KERR, *A HANDBOOK OF MEXICAN LAW* 50 (1909); DOMAT, *CIVIL LAW*, tit. 2, § 10 (1850).

¹² Bonner v. Wilkinson, 106 Eng. Rep. 1340 (1822), which dealt with estoppel to deny place of residence as recited in a writ.

¹³ COKE ON LITTLETON (1794) (hereinafter cited as CO. LITT.) § 446, cited by the court in Jackson v. Winslow, 9 Cow. 18 (N.Y. 1828), which in turn is found in the Texas case of Harrison v. Boring, 44 Tex. 255 (1875).

In Van Rensselaar v. Kearney, 52 U.S. (11 How.) 325 (1850), is found a fairly thorough analysis of the doctrine of after-acquired title as traced from English authorities. However, it is strange that the Texas court virtually ignored it until Lindsay v. Freeman, 83 Tex. 259, 18 S.W. 727 (1892), wherein it was adopted as the rationale for decision. It is cited in Willis v. Smith, 72 Tex. 565 (1889).

¹⁴ CO. LITT. § 446, at 265a-b.

seiseth the Grandfather, and make a feoffment in fee, the Grandfather dieth, the Father against his owne feoffment shall not enter; but if he die, his son shall enter. And so note a diversity between a Release, a Feoffment, and a Warrantie: a Release in that case is void; a feoffment is good against the feoffor, but not against his heire; a warrantie is good both against himselfe and his heires.

There is no doubt that this is the source of the oft-repeated statement of the courts that after-acquired title is passed to the grantee in a deed containing a covenant of warranty to prevent a circuitry of action on the covenant. For instance, two early Texas court opinions (warranty cases) contain the following:

But, in addition to all this, there is covenant of warranty in the deed against the heirs. In such cases the principle is, if the ancestor has wrongfully conveyed the land, with warranty, to make the covenant operate as a *rebutter* to the claim of the heirs to whom the assets descended, and thereby prevent circuitry of action. Because, if they hold the land, which is real assets, it should be, in honesty and justice, subjected to the payment of damages for the breach of the covenant of warranty. For, if the land is recovered from the covenantee, he has his right of action to recover from the heirs upon the covenant of warranty. The heirs being estopped by the deed of the ancestor to deny his title, they are equally concluded by the express and sound recitals in the deed.¹⁵

and,

Where the deed assumes to convey the land and not merely the title, such as it is that the vendor has in it, and there is a general warranty, the deed not only imports a *bona fide* conveyance in reference to the subject of the sale and purchase designed thereby to be vested in the purchaser, but it will carry any after-purchased rights or title that may be acquired by the vendor, thereby avoiding a circuitry of action on the general warranty.¹⁶

The rationale of the courts in warranty cases may be paraphrased as follows: When (1) the deed (or other conveyance) contains an express covenant of warranty, or (2) a covenant of warranty may be implied by statute from the words of grant, then (3) any interest thereafter acquired by the grantor will be given to the grantee to avoid a circuitry of action on the covenant.

In predicating such a result on Lord Coke's statement, the following assumptions or implications must also be made and sustained:

¹⁵ Gould v. West, 32 Tex. 339, 353 (1869).

¹⁶ Harrison v. Boring, 44 Tex. 255, 261 (1875). Also notice similar language in Bush v. Marshall, 47 U.S. (6 How.) 284 (1848), and French v. Spencer, 62 U.S. (21 How.) 228 (1858). See also Jackson v. Winslow, 9 Cow. 18 (N.Y. 1828), cited by Texas courts prior to 1892.

1. The warranty discussed by Lords Littleton and Coke is the same as that today known in Texas as a covenant of warranty. 2. Statement (3) above, must mean that if a "circuity of action" is to be avoided (a) the grantor is bound on the covenant of warranty so that it may be enforced against him, and (b) an enforceable cause of action exists in favor of the grantee — for without both, no action by the grantor could be resisted by the grantee on the basis of an enforceable covenant, thereby producing a circuity of action. 3. An action for damages is not the only proper remedy in this situation.

B. Coke's Warranty

There is little doubt that the warranty referred to by Coke is not the covenant of warranty used in modern conveyances, but the ancient warranty of common law.¹⁷

1. Pre-Norman Mists

The first mention of anything akin to warranty to land appears in England soon after the Norman Conquest in conveyances containing a mention of the consent of an heir expectant.¹⁸ Supposedly, the attempt of an alienor to bind his heirs grew out of the struggle for supremacy in Normandy, prior to and at the time of the Norman Conquest (1066 A.D.), between two systems of descent, one being the policy of the law that equality should be maintained among sons,

¹⁷ VII CO. LITT. 384b, 385a; HOLDSWORTH, HISTORY OF ENGLISH LAW 256; RAWLE, COVENANTS FOR TITLE, ch. 1 (5th ed.); 1 THOMAS, COKE ON LITTLETON 199 N.A.; and II BLACKSTONE, COMMENTARIES 301 (1807), where it was said:

By the feudal constitution, if the vassal's title to enjoy the feud was indisputed he might vouch, or call the lord or donor to warrant on insure his gift; which if he failed to do, the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so, by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feudal verb *dedi* to hold himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift), were originally stipulated to be rendered. Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage (which was called *homage auncestrel*), this also bound the lord to warranty; the homage being an evidence of such a feudal grant.

¹⁸ Reference is here made to transfers of a freehold interest in land. Although, prior to the Norman Conquest, land on the continent could be passed by symbolic delivery, and there is some evidence that such a transfer could be made by instrument alone under Anglo-Saxon law, at least as regards the so-called "book-land"; after the conquest the mode of transfer of land reverted to methods of antiquity, *i.e.*, the transfer of the thing itself. See II POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 87, 250-52 (1923); III HOLDSWORTH, A HISTORY OF ENGLISH LAW 221-222 (1956). As is commonly known this was referred to as "livery-of-seisin"; however, a writing could be made to serve as a memorandum of the transfer. And see PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 526 (1929); VII GLANVILL, A TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND 114 (1187) (Beames' transl. 1900).

and the other being the system of primogeniture, where the eldest son would take to the exclusion of others sons or daughters.¹⁹

The early writer Glanvill indicated that under the policy of equality of descent it was improper, and perhaps illegal, for an ancestor to alienate more than a "reasonable amount" of land to a third party, which would effect a disinheritation of his heirs or to prefer one son to the disadvantage of the others.²⁰

By the thirteenth century the rule of primogeniture as to descent of land, and the concept of freedom of alienation of land was in ascendancy in England. In the development of freedom of alienation, with the ability to move land from family ownership into commerce, it apparently became the custom of the alienor to attempt by recitals to bind his heirs expectant in order to avoid the restriction on conveying lands that may have existed under the former Anglo-Saxon system of equality of descent. It is thought that this recital later became the clause of warranty whereby the alienor bound himself and his heirs to warrant the alienee against all men. The result was that the ancestor could alienate the land free of the claim of his heirs, and, if a warranty existed, the burden of it would fall upon the eldest son, so that he could no longer claim the inheritance from his father.²¹

2. Feudal Relationships and the Common Law Warranty

The feudal warranty originally existed in law without the necessity of a writing (lands being transferable by transfer of possession, *i.e.*, livery of seisin) and was inherent in the feudal concept of homage.²² The feudal relationship of lord and vassal was reciprocal in nature, the vassal owing services to the lord and the latter owing a duty to protect the vassal in his fief. In what has been termed the earliest

¹⁹ PLUCKNETT 527-529.

²⁰ VII GLANVILL 1; PLUCKNETT 527. Also see II POLLOCK AND MAITLAND 253-254.

²¹ III HOLDSWORTH 196, 230. In the author's note to Beames' GLANVILL 1, a diversity of opinion is demonstrated as to the origin of "warranty":

Warrantum. Sir Henry Seplman is inclined to derive this Term from the Saxon Primitive War, *arma, telum, defensio, etc.* Dr. Sullivan tells us, it was derived from War, because in real Actions, the Trial was of old by Combat. Dr. Cowell, however, prefers deriving *warrantia* from the French *garantie* or *garant*. The Doctor notices the *stipulatio* of the Civilians, but, as he observes, "This reacheth not so far as our warranty." The term, it seems, is of great antiquity, and is said not to have been unknown to the *Longobardi* in their original settlements. (Spelm. Gloss. ad voc. and Cowell's Interpreter, ad voc. and Sullivan's Lectures, 119.) It does not fall within the scope of these notes, to bring the Law down to the present day.—The translator would otherwise have availed himself largely of Bracton's 5th book. Fleta, L. 5. c. 4. Britton, 197, etc. Co. Litt. 364. b. et seq. and Mr. Butler's admirable annotations.

Also see PLUCKNETT 612; RAWLE, COVENANTS FOR TITLE, ch. 1 (5th ed. 1887), Co. LITT. § 697, at 365a; II BLACKSTONE, COMMENTARIES 302.

²² Co. LITT. § 145. Also see note of Coke, 101b; author's extended note, COKE ON LITTLETON 199A (Thomas ed. 1836); PLUCKNETT 612; RAWLE 2.

instance of a statute giving effect to words in a conveyance,²³ the statute of 4 Edw. I, Statutum de Bigamis, ch. 6 (A.D. 1276), warranty being created from the use of the words "Dedi and Concessi" in a deed of feoffment, the relationship of warranty to feudal service is clearly stated:

In Deeds also where is contained [Dedi & concessi tale tenementum] without homage, or without a Clause that containeth Warranty, and to be holden of the Givers, and their Heirs, by a certain Service; It is agreed that the Givers, and their Heirs shall be bounden to Warranty; and where is contained [Dedi & concessi, & c.] to be holden to the Chief Lords of the Fee, or of other [and not of Feoffers, or of their Heirs] reserving no Service, without Homage, or without the foresaid Clause, their Heirs shall not be bounden to Warranty; notwithstanding, the Feoffer during his own Life, by Force of his own Gift, shall be bound to warrant.

A further effect of the statute de Bigamis was to create warranty between a tenant in fee who created an entailed estate and his tenant in tail.

Upon disputation (by a demandant) of the ownership of the vassal or tenant in tail, the latter could thereupon "vouch to warranty" (*i.e.*, implead or call to warranty) the warrantee who had the duty to defend the ownership of the vassal. Upon default by the vouchee or judgment in favor of the demandant against the vassal or tenant in tail, the latter by means of a writ of *warrantia chartae* could recover judgment against the vouchee which entitled the disposed vassal to recover from the vouchee lands of equal value.²⁴

Prior to the year 1290 express warranties were little used, as warranties would exist in law from a relationship or be implied from the words of an instrument used to evidence a feoffment.²⁵ However, in 1290 the statute Quia Emptores was passed prohibiting the practice of subinfeudation (*i.e.*, the practice of a feoffor alienating in such a way as to become an immediate lord to the feoffee, thereby cutting off feudal services from the holder of the land to the chief lord) and allowing alienation by a feoffor free of service with substitution of the feoffee as tenant to the chief lord.²⁶

²³ RAWLE 3. Note the similarity with our present statute, TEX. REV. CIV. STAT. ANN. art. 1297 (1962). See also CHITTY, II BLACKSTONE, COMMENTARIES 300, 301, and notes as well as author's appendix in CO. LITT. 541-542 (Thomas ed. 1836).

²⁴ For fuller discussion of the operation of the writs see CO. LITT. 365a, 101b, 102a-b; CO. LITT., author's notes 199A and 243-244 (Thomas ed.); CHITTY, II BLACKSTONE, COMMENTARIES 300, 358-359; PLUCKNETT 411-412.

²⁵ VII HOLDSWORTH 353. See also note 18 *supra*.

²⁶ Forasmuch as Purchasers of Lands and Tenements of the Fees of great men and [other Lords] have many times heretofore entered into their Fees, to the prejudice of the Lords, [to whom] the Freeholders of such great men have sold their Lands and Tenements to be holden in Fee of their Feoffers, and not

The result was that the feoffee owed no duty of service to the feoffor, the basis for warranty on homage disappeared, and express warranties came into widespread use.

Strangely, the warranty became a device at common law to attain results fully as important as securing the title of the feoffee. The first was a procedural device used to achieve delay in suits for land where the defendant would vouch to warranty a vouchee who was either a minor, or was not available to the court, whereupon the action would be delayed until the vouchee achieved age or became available to the court.²⁷ The procedure became very burdensome and complex and was finally alleviated by statute.²⁸

Probably the most important use of the warranty was as a disentailing device. For instance, after the statute de Bigamis, if O, who had an eldest son, A, owned an estate tail, he could alien a fee estate to X but could not bar an action by A to recover. If, however, O alienated with warranty, the entail and the burden of warranty would pass to A, who would be precluded from claiming the estate. The device was used to bar estates tail as well as remainders and reversions.²⁹

of the Chief Lords of the Fees, whereby the same Chief Lords have many times lost their Escheats, Marriages, and Wardships of Lands and Tenements belonging to their Fees; which thing seemed very hard and extream unto those [Lords and other great men] and moreover in this case manifest Disheritance: Our Lord the King, in his Parliament at Westminster after Easter, the eighteenth year of his Reign, that is to wit, in the Quinzime of Saint John Baptist, at the instance of the great Men of the Realm, granted, provided, and ordained, That from henceforth it shall be lawful to every Freeman to sell at his own pleasure his Lands and Tenements, or part of them; so that the Feoffee shall hold the same Lands or Tenements of the [Chief Lord of the same Fee, by such Service] and Customs as his Feoffor held before.

And if he sell any part of such Lands or Tenements to any, the Feoffee shall immediately hold it of the Chief Lord, and shall forthwith be charged with the Services, for so much as pertaineth, or ought to pertain to the said Chief Lord for the same parcel, according to the Quantity of the Land or Tenement [so] sold: And so in this case the same part of the Service [shall remain to the Lord, to be taken by the hands of the Feoffee, for the which he ought] to be attendant and answerable to the same Chief Lord, according to the Quantity of the Land or Tenement sold, for the parcel of the Service so due.

Statute of 18 Edw. Ic. I and II (1290) (*Quia Emptores*).

²⁷ PLUCKNETT 411; also see extended note of author, II CO. LITT. 243-244 (Thomas ed. 1836).

²⁸ Westminster, 3 Rdw. I, ch. 39, 40 (1275); statute *de vocatis ad warrantum*, 20 Edw. I (1292); and 14 Edw. III, ch. 18 (1340). It is interesting to note that the last statute prohibited vouching to warranty a dead man, against which the demandants could not aver the vouchee was dead! This would seem to be the ultimate delay and well it is that it does not exist in modern times.

²⁹ PLUCKNETT, at page 617 states:

It now remains to consider the effect of warranties created by those who were not tenants in fee simple. The problem first became acute when doweresses and tenants by the curtesy resorted to tortious feoffments coupled with warranties. When there was issue of the marriage it would normally happen that the issue would be heir to both patents; hence as heir to his father's warranty he would be barred from claiming lands to which he was entitled

So great had become the use of warranty in such a manner that in 1278 the Statute of Gloucester³⁰ was passed prohibiting warranties of a tenant by courtesy from barring his heirs; however, the statute did not extend to warranties of a tenant in tail. Apparently this was later accomplished by a judicial construction of the statute.³¹

This led to a distinction between warranties of an ancestor passing to his lineal descendant, the heir to whom the land would pass under the rule of primogeniture (called lineal warranties), and warranties binding an heir made by an ancestor from whom the heir could not inherit the land (called collateral warranties).³²

as his mother's heir, and as heir to his mother's warranty (created while she was dowress) he would be barred from claiming lands which were his paternal inheritance. Such practices struck at the root of the common law scheme of family relationships, and in 1278 the legislature intervened.

³⁰ The Statutes of Gloucester, 6 Edw. I, ch. 3 (1278):

IT is Established also, That if a Man aliene a Tenement, that he holdeth by the Law of England, his Son shall not be barred by the Deed of his Father, from whom no Heritage to him descended, to demand and recover by Writ of Mortdauncestor, of the Seisin of his Mother, although the Deed of his Father doth mention, that he and his Heirs be bound to Warranty. And if any Heritage descent to him of his Father's side, then he shall be barred for the Value of the Heritage that is to him descended. And if in Time after any Heritage descend to him by the same Father, then shall the Tenant recover against him of the Seisin of his Mother by a judicial Writ that shall issue out of the Rolls of the Justices before whom the Plea was pleaded, to resummon his Warranty, as before hath been done in Cases where the Warrantor cometh into the Court, saying, That nothing descended from him by whose Deed he is vouched. And in like manner the Issue of the Son shall recover by Writ of Cosinage, Aiel, and Besaiei. Likewise in like manner the Heir of the Wife shall not be barred by his Action, after the Death of his Father and Mother, by the Deed of his Father, if he demand [by action] the Inheritance of his Mother by a Writ of Entry, which his Father did aliene in the time of his Mother, whereof no Fine is levied in the King's Court.

³¹ Y.B. 33-35 Edw. I (Roll Ser.) 388. This case is so cited by Plucknett; however, the author was unable to verify the citation. PLUCKNETT 617; II HOLDSWORTH 100; II BLACKSTONE, COMMENTARIES; 303 CO. LITT. 365b., contain extended discussions of the operation of lineal and collateral warranties.

³² As put in CO. LITT. § 697, at 365a, together with Coke's comments:

It is commonly said that there be three Warranties, scil. Warrantie Lineall, Warrantie Colaterall, and Warrantie that commence by disseisin. And it is to be understood, that before the Statute of Glou' all Warranties which descended to them which are heires to those who made the Warranties, were barres to the same heires to demand any Lands or Tenements against the Warranties, except the Warranties, which commence by disseisin. For such warrantie was no barre to the heire, for that the Warrantie comenced by wrong, viz. by disseisin.

Coke's Comment on § 697:

Here our author beginneth this Chapter with an exact division of warranties. A warrantie is a covenant reall annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and either upon voucher, or by judgment in a writ of *warrantia cartae*, to yield other lands and tenements (which in old bookes is called *in excambio*) to the value of those that shall be evicted by a former title, or else may be used by way of rebutter.

And also commented on by Blackstone:

Lineal warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty; as where a father, or an elder son in the life of the

Since only lineal warranties were prevented by statute or judicial construction from barring an heir of an entailed estate, a great deal of ingenuity was used to reach the same result through the medium of collateral warranty, which, to be successful, needed the cooperation of other family members. As a result much complicated law (now obsolete) was developed concerning the distinction between and operation of lineal and collateral warranties.³³

Following the passage of the Statute of Uses,³⁴ the common law modes of assurance fell into disuse, as the foundation was thereby laid for modern conveyances by the raising and execution of a use, without the necessity for livery of seisin.

Through a series of statutes in England the common law doctrine of warranty was progressively limited until, in 1833 by the act of 3 & 4 Will. IV chs. 37 and 74, lineal and collateral warranties were abolished along with the remnants of common law real actions.

C. *The Covenant Of Warranty*

1. *England*

In England covenants of title developed following the passage of the Statute of Uses. It has been well argued that common law warranty, a covenant real, being no longer appropriate to the modern form of conveyancing (since it passed only to the eldest son due to its basis in primogeniture) fell into disuse, and was replaced by broader personal covenants of the grantor to which he would respond in damages.³⁵ A distinction was recognized by early writers between the common law warranty and covenants for title. Lord Coke stated:

father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son. Collateral warranty was where the heirs title to the land neither was, nor could have been derived from the warranting ancestor, as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother.

³³ Co. Litt. § 697, 364b; § 706, 371a; § 707, 371b; § 713; Co. Litt. 221 n. (Thomas ed.); II BLACKSTONE, COMMENTARIES 301, 302, 303; PLUCKNETT, 617.

³⁴ 27 HEN. VIII, ch. 10 (1536).

³⁵ VII HOLDSWORTH 257, wherein the author states:

Not much is heard of the warranty implied on a feoffment for life after the middle of the seventeenth century. The reasons are fairly obvious. In the first place, the procedure by which it was enforced was becoming obsolete. We have seen that it could be enforced only by voucher or by writ of warrantia cartae. It could be used as a defence in the new action of trespass. Therefore it was not at first available as a defence in the new action of ejectment; but the inconvenience of this rule, and the desire of the courts to favour this new action, induced them to allow a defendant to get the benefit of the warranty by giving it in evidence. In spite, however, of this relaxation, it was a remedy which was bound up with the real actions. It therefore fell out of use with them, and for the same reasons as they fell out of use.

Holdsworth further cites Booth, writing in 1701, "This action is brought rarely, though sometimes at this day it may be, for I remember one about 20, or 22 years ago, before the justice of Chester. . . ." (VII HOLDSWORTH 257 n.3). See also RAWLE 11.

"But note, there is a diversitie betweene a warrantie that is a covenant reall, which bindeth the partie to yield Lands or Tenements in recompense, and a Covenant annexed to the Land, which is to yield but damages, for that a Covenant is in many cases extended further than the warrantie."³⁶

The covenants for title eventually superseded the common law warranty, and, as developed in England, the grantor would covenant:

- (1) that he was seized in fee (covenant of seisin),
- (2) that he had the power to convey (covenant of right to convey)
- (3) for continuous quiet enjoyment of the purchaser and his heirs and assigns (covenant of quiet enjoyment),
- (4) that the lands were free from encumbrances (covenant against encumbrances), and
- (5) for further assurances if necessary to vest title in the grantee (covenant of further assurance).

2. *United States*

Apparently what is known in this country as the "covenant of warranty" had no counterpart in England,³⁷ and, indeed, a search of contemporary English law uncovers no mention of such a covenant as it related to land.³⁸ What then is the source of the covenant of warranty in the United States and Texas, if such did not exist in England?

The first settlers in the United States in any numbers began arriving around the year 1640, and by 1690 there were some 250,000 colonists in what is now eastern United States. At this time in England real actions had not been abolished and the common law action of warranty was still used, though obsolete. It is the view of one writer³⁹ that colonists learned in the common law transmuted the common law warranty into a covenant, by using the feudal form of warranty and adding words of covenant.⁴⁰

A search of early Texas cases for the history of the covenant of warranty is unproductive.⁴¹ However, in the later Texas case of

³⁶ CO. LITT. 384b. Also see author's note, II CO. LITT. 260-265 (Thomas ed.).

³⁷ RAWLE, COVENANTS FOR TITLE ch. VIII (5th ed.) (herein referred to as RAWLE).

³⁸ An examination of MEWS, DIGEST OF ENGLISH CASE LAW (2d ed. 1925); THE ENGLISH AND EMPIRE DIGEST (1962); and HALSBURY, LAWS OF ENGLAND (3d ed. 1956), shows no listing under warranty or covenant of warranty to land.

³⁹ RAWLE 351-358.

⁴⁰ RAWLE, ch. VIII, § 116. See also ch. I, § 14 n.3, where the author comments upon the amalgamation of common law into the jurisprudence of the colonies.

⁴¹ Of some thirty-five cases decided up to the year 1886 no discussion was found as to the basis for the covenant of warranty, although some discussion was found as to the measure of damages to be applied. In the latter case the courts did draw analogies to English law, but, generally, did not identify which covenant for title the English courts were considering.

Wiggins v. Stephens,⁴² the court stated:

Under ancient English law the warranty was, in substance, a covenant whereby the grantor of a freehold estate and his heirs were bound to warrant the title, and the tenant might bring a writ of *warrantia chartae* against the warrantor to compel him to assist with a good plea or defense or else to render damages to the amount of the value of the land, if recovered against the tenant. Wendell's Blackstone's Commentaries, vol. 3, p. 300. In that proceeding the ancient uniform rule was that the plaintiff recovered only the value of the land as it was when the warranty was made. The reimbursement, at that time, consisted of lands of the warrantor, or which his heir or heirs inherited from him, of value equal to that from which the feoffee was evicted. When ordinary purchase and sale of land began to become common, the idea of fluctuation in value was not in mind, and the consideration was regarded as the pecuniary equivalent of the old agreement of *enfeoff* of lands of equal value. Instead of getting land of equal value, the plaintiff was to get what both parties had by consent substituted for it—the consideration. Personal covenants supplanted the ancient warranty because they resulted in an easier, more certain, and more effectual recovery. But the change did not affect the established measure of damages, except to substitute for land of value equal to that from which the defendant was evicted the consideration paid for it, with interest, as the thing to be recovered.

The language quoted above bears a striking resemblance to the theory of Rawle⁴³ concerning the transmutation of the common law warranty. However, it further appears that the paraphrase of Blackstone is not accurate⁴⁴ and that the correct quote is that the "lord was bound to give him another *feud* of equal value in recompense." No mention is made of damages. Normally an action based on common law warranty would not support a recovery for damages. It is true that the courts did make an exception in the situation where recovery on the warranty as a covenant real was impossible, to prevent a failure of justice, by "moulding it into a covenant personal."⁴⁵ Since this apparently was rarely done it would seem to furnish little basis upon which to connect the modern day covenant with the feudal warranty.

However, the Texas Courts were not alone, for the early colonial courts, nearer to the common law traditions than were the Texas

⁴² 246 S.W. 84, 85 (Tex. Comm. App. 1922).

⁴³ Note 39 *supra*.

⁴⁴ See complete text, note 17 *supra*, and also see extended note in 1 SMITH'S LEADING CASES 215 (8th ed. 1852); RAWLE, § 113. According to the note in RAWLE only two reported cases were found allowing recovery of damages, one in the year 1600, the other in the year 1845.

⁴⁵ RAWLE 144, 145 n.1 (collecting early cases showing such confusion).

courts, often confused the nature and effect of common law warranty with covenants of title.⁴⁶

Unlike the cases dealing with after-acquired title, where the early Texas courts searched for a basis for the rule, in cases dealing with the covenant of warranty for title the Texas courts accepted and adopted the early colonial decisions without question. It may properly be said that the covenant of warranty in Texas has no direct antecedent in the common law warranty.

D. *The Common Law Warranty As A Basis For Passing After-Acquired Title*

Rawle, an early author of an outstanding work on covenants for title, writing during the last half of the nineteenth century, when some learning in depth still existed as to the English common law, was vehement in his position that the feudal warranty could not pass after-acquired title, that notwithstanding the manner and extent, if any, to which the covenant of warranty could be analogized to the feudal warranty, in no way could the covenant historically support after-acquired title, the only remedy being one in damages.⁴⁷ The conclusion does not seem to be entirely correct.

It has been stated that a feudal warranty could not exist without an estate to support it. In Coke's note to section 742 of *Coke on Littleton*, he states: "Here Littleton putteth another case upon the same ground and reason, viz, where the state whereunto the warranty is annexed is defeated, there the warranty itself is defeated also, which is one of the maxims of the common law."

The estate necessary to support the warranty could be created in three ways: (1) by feoffment,⁴⁸ which necessitated the livery of

⁴⁶ This is well stated by Rawle:

These cases have at times been considered as deciding broadly that a personal action of covenant would at any time have lain upon a warranty, and on the other hand it has more than once been seriously urged, as it was in *Williamson v. Codrington*, that upon a covenant of warranty in its present form nothing but a writ of *warrantia chartae* can be brought. In truth, save that the old warranty and the present covenants were alike intended as a means of redress against loss of the estate, nothing could be more unlike than the two. The former was a part of the system of feudal tenure, and the remedy upon it by writ of *warrantia chartae* or voucher, though peculiar, was appropriate. The latter was a part of what some have called the modern system of law, and the remedy upon it by the personal action of covenant equally appropriate. Warranty originally partook of the simplicity of the common law, and its effect by way of rebutter of the heir was simple and just, till the ingenuity of the times seized upon it for a particular purpose and fashioned it to meet an end—that of barring estates tail—for which it had never, of course, been intended, and hence arose complications which to one imperfectly learned in the history of the subject would seem to present great difficulties.

RAWLE 144-45.

⁴⁷ RAWLE chs. VIII and IX.

⁴⁸ CO. LITT. 367a.

seisin; (2) by a judicial proceeding known as a fine;⁴⁹ and, (3) by common recoveries, a fictitious judicial action mainly used to unfetter entailed estates.⁵⁰ As mentioned above, fines and recoveries were abolished in 1833 in England by statute.⁵¹

Since livery of seisin was deemed to be an actual transfer of the land itself, a person seized of the land could, though wrongfully, pass a fee simple estate by way of livery. The fine and common recovery had a similar effect, and feoffee again being vested with a fee estate capable of supporting a warranty. This may be contrasted with the operation of a modern deed through which a grantee acquires no title to Blackacre if, in fact, his grantor had none to convey. At common law the feoffee had an estate in land until evicted. The feoffment, fine or common recovery, therefore, did not pass an after-acquired title in any sense, but passed a present (although sometimes defeasible) estate.⁵²

Other modes of conveyance in use prior to the passage of the Statute of Uses included the grant, which applied only to incorporeal interests⁵³ and may be dismissed from consideration, and the lease and release which transferred title without livery of seisin,⁵⁴ but apparently only operated on the estate presently owned by the releasor.⁵⁵

⁴⁹ Co. LITT. 48a, b. Blackstone described a fine as follows:

A fine is sometimes said to be a feoffment of record: though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveyancy and assuring of lands; though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisen is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however, fictitious, inducing inequal notoriety.

II BLACKSTONE, COMMENTARIES 348.

⁵⁰ See *op. cit. supra* note 49, at 357.

⁵¹ FINE AND RECOVERIES ACT, 3 & 4 WILL. IV chs. 37 and 74 (1833).

⁵² Co. LITT. 49a, 367a, 387a, 599, 611; RAWLE, § 254, at 389.

⁵³ II BLACKSTONE, COMMENTARIES 317.

⁵⁴ *Id.* at 318, 325.

⁵⁵ Rawle strongly argued that a release could only operate on an existing estate and that a warranty contained in a release, when the releasor owned no estate in land, would not bind his heirs, it is not entirely clear that this was so. It appears to be the clear import of Co. LITT. § 446, set forth in text accompanying note 14 *supra*, that a release with warranty by one without an interest may bar the releasor.

Rawle spends some time explaining the existence of a present estate to support Coke's comment in Co. LITT. § 446, *i.e.*, that a release with warranty will bar the son. RAWLE 388-93. However, in an analogous fact situation, Coke finds no estate to support a release without warranty:

But here in the case which Littleton puts where the Sonne release in the life of his father, this release is void (a) because hee hath no right at all at the time of the release made, but all the right was at that time in the Father, but after the decease of the Father, the son shall enter into the land, against his owne release.

Although it may be argued that Rawle was wrong and that a warranty contained in a release where the heir has no present title would bar the heir, in Texas, at least, the release could be upheld as a conveyance of an expectancy. *Hale v. Hollon*, 90 Tex. 427,

Since the feudal warranty only bound heirs determined under the rule of primogeniture, no situation at common law would be comparable to that existing today where the title acquired by a grantor following his execution of a deed is not inherited or devised. It would seem that it may be concluded that the feudal warranty did not operate to pass after-acquired title, as we understand the doctrine today.

E. Covenants of Title As A Basis For Passing After-Acquired Title

Although the covenant of warranty has been the covenant most frequently mentioned (among the covenant cases) as a basis for passage of after-acquired title in Texas, some early cases also reached this result where the breach was of the covenant of seisin,⁵⁶ covenant of quiet enjoyment,⁵⁷ or the covenant of further assurance.⁵⁸

1. The Covenant of Seisin

There is some question as to the extent to which the covenant of seisin is applicable in Texas today.⁵⁹ It should be more properly thought of as a covenant that the grantor is indefeasibly vested with the land described. The common law concept of seisin has never been recognized as part of our jurisprudence. This covenant is breached upon conveyance and it appears in Texas that the cause of action does not pass to and cannot be enforced by a remote grantee.⁶⁰ Although this result can be criticized on the ground that upon breach a chose in action is created which may be considered as assigned by later conveyances to subsequent grantees who suffer harm, it is also clear that historically the remedy for breach of the covenant of seisin or good right to convey was solely in damages⁶¹ and generally has not been relied upon as a basis for passing the after-acquired title of the grantor.

2. The Covenant of Further Assurance

The covenant of further assurance, on the other hand, is somewhat similar to the doctrine of after-acquired title in that the grantor binds himself to execute such further instruments as may be neces-

39 S.W. 287 (1897) and *Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270 (1942)), which is not strictly analogous to the passing of an after-acquired title.

⁵⁶ *Gould v. West*, 32 Tex. 339 (1869); *Dupree v. Frank*, 39 S.W. 988 (Tex. Civ. App. 1897); *Randolph v. Junker*, 21 S.W. 551 (Tex. Civ. App. 1892).

⁵⁷ *Texas Pacific Coal & Oil Co. v. Fox*, 228 S.W. 1021 (Tex. Civ. App. 1921).

⁵⁸ *Gould v. West*, 32 Tex. 339 (1869).

⁵⁹ *Childress v. Siler*, 272 S.W.2d 417 (Tex. Civ. App. 1954) *error ref. n.r.e.*; *Fender v. Farr*, 262 S.W.2d 539 (Tex. Civ. App. 1953); *Shannon v. Childers*, 202 S.W. 1030 (Tex. Civ. App. 1918) *error ref.* Note also the indecision as to whether the covenant, if it exists, runs with the land.

⁶⁰ See cases cited note 59 *supra*.

⁶¹ *Childress v. Siler*, 272 S.W.2d 417 (Tex. Civ. App. 1954) *error ref. n.r.e.*

sary to perfect title in the grantee, which would include the duty to convey any later-acquired title to land described in a deed containing such covenant. This covenant is treated as running with the land and passes to remote grantees. However, the vesting of the after-acquired title does not pass by virtue of the original deed but only upon enforcement by an action of specific performance of the contractual right contained therein.

Although the passing of after-acquired title might logically have developed from an extension of the covenant of further assurance, it has never been so held.⁶² This is probably due to the fact that this covenant is not customarily included in conveyances⁶³ in Texas and is not implied by law.

3. *The Covenant of Quiet Enjoyment*

The covenant of quiet enjoyment has not been mentioned by the courts as a basis for passing after-acquired title and in Texas is probably treated as being included in the covenant of general warranty.

4. *The Covenant of Warranty*

The extent to which the courts have used the covenant of warranty as a vehicle to support the passage of after-acquired title to prevent a circuity of action on the covenant, would presuppose the existence of a valid covenant and an enforceable cause of action thereon.

An enforceable contractual right normally requires the support of consideration, and it has been held in Texas that where the deed is without consideration an action on the covenant of warranty fails.⁶⁴ However, at least one Texas case has held that natural love and affec-

⁶² In *Gould v. West*, 32 Tex. 339 (1869), the court merely mentions the covenant of further assurance as one of several rationales.

⁶³ Although not used generally in conveyances it is often found in assignments of oil and gas leases as is an express statement of ownership (seisin) and good right to convey:

Assignors, and each of them warrant (1) that they are the lawful owners of the above described oil, gas and mineral leases, and each of them, and all rights, titles, interests and estates thereunder, (2) that the net leasehold estate herein conveyed (after deduction of outstanding overriding royalty and all other outstanding interests) is not less than three-fourths (3/4ths) of eight-eighths (8/8) of all of the oil, gas and other minerals, in, to, under and that may be produced from the lands described in said oil, gas and mineral leases, (3) that all rentals and royalties payable under each of said leases have been paid, (4) that each of said leases is in full force and effect and is a valid and subsisting oil, gas and mineral lease against the hereinabove described land, (5) that Assignors, and each of them, have good right and authority to sell and convey the same, and (6) that said leases and mineral leasehold estates and each of them, except as herein described, are free from any overriding royalties or production payments, liens, encumbrances or claims of any type or character.

⁶⁴ Few Texas cases appear on this point. See *Davis v. Agnew*, 67 Tex. 206, 2 S.W. 376 (1886); and *Whatley v. Patten*, 31 S.W. 60 (Tex. Civ. App. 1895).

tion are sufficient to support the covenant of warranty when the remedy sought is one of after-acquired title rather than damages.⁶⁵ It also appears that the warranty cases will support after-acquired title where there is no present danger of an eviction and where no personal action on the covenant would lie.⁶⁶

If the grantee and his assignees have an enforceable right to an after-acquired title in factual situations where they could not enforce the covenant of warranty in a suit for damages, the court clearly is not passing after-acquired title to prevent a circuitry of action on the covenant. Not only have the courts substantially distorted the covenant of warranty in after-acquired title cases as to the necessity for an enforceable contract right and eviction of the covenantee, the remedy is distorted as well, the courts considering that title passes "eo instante"⁶⁷ to the grantee and his successors upon acquisition by the grantor. This is rather a strange result for the holder of an enforceable contract right, *i.e.*, an automatic extra-judicial specific performance.

It is the author's conclusion that the doctrine of after-acquired title in Texas does not find a proper theoretical basis in the rationale of prevention of multiple actions based on the covenants of warranty, or other covenants of title.

F. Estoppel As A Basis For Passing After-Acquired Title

1. Early Texas Cases

Although it may be concluded that no historical precedent to support after-acquired title arises from the common law warranty, this is not true as to the doctrine of estoppel by deed.⁶⁸ In the United

⁶⁵ Robinson v. Douthit, 64 Tex. 101 (1885).

⁶⁶ Gibson v. Turner, 156 Tex. 289, 294 S.W.2d 781 (1956); Childress v. Siler, 272 S.W.2d 417 (Tex. Civ. App. 1954) *error ref. n.r.e.*; Morris v. Short, 151 S.W. 633 (Tex. Civ. App. 1912). *But see* Freteliere v. Hendes, 57 Tex. 392 (1882), where a release of warranty destroyed grantee's right to an after-acquired title.

⁶⁷ Caswell v. Llano Oil Co., 120 Tex. 139, 36 S.W.2d 208 (1931); Baldwin v. Root, 90 Tex. 546, 40 S.W. 3 (1897); Texas Pacific Coal & Oil Co. v. Fox, 228 S.W. 1021 (Tex. Civ. App. 1921); Newton v. Easterwood, 154 S.W. 646 (Tex. Civ. App. 1913) *error ref.*; Lowry v. Carter, 102 S.W. 930 (Tex. Civ. App. 1907) *error ref.* At least one early case indicated that an equitable title passes to the grantee upon the grantor's acquired title, although a warranty rationale was relied upon to support the after-acquiring title, Ackerman v. Smiley, 37 Tex. 211 (1872).

⁶⁸ For instance Lord Coke states:

Estoppe commeth of the French word Estoupe, from whence the English word Stopped: and it is called an Estoppel or Conclusion, because a mans owne Act or acceptance stoppeth or closeth by his mouth to alleage or plead the truth: And Littletons case here proveth this description.

Touching Estoppels, which is an excellent and curious kinde of learning, it is to be observed, that there be three kinde of Estoppels, viz. By matter of Record, by matter in writing, and by matter in Pais. . . .

(b) By matter in Writing, as by Deed indented, by making of an Acquit-

States the courts early adopted the estoppel by deed doctrine to preclude the parties to a deed and their privies from denying the recitals contained therein. The estoppel to deny recitals was then expanded to pass title by estoppel, *i.e.*, after-acquired title:

An estate by estoppel arises, generally speaking, in cases where a grantor without title makes a lease or conveyance of land by deed with warranty, and subsequently by descent or by purchase acquires the ownership. This after-acquired title of the grantor "inures," it is usual to say, by estoppel to the benefit of the grantee. It would perhaps more accurately state the situation, under our modern deeds of conveyance, to say that the deed, which the grantor engages to warrant and defend, is a solemn stipulation that the grantor has the title which he is now about to transfer to the grantee as a purchaser for value. In the face of this he cannot be heard to say, after making the transfer, that he had not title at the time. So his new title lies *lifeless* in his hands against such purchaser; the estoppel not being a true conveyance.⁶⁹

In probably the leading early case in the United States, *Van Rensselaer v. Kearney*,⁷⁰ the United States Supreme Court speaking through Mr. Justice Nelson, firmly bottomed the doctrine of after-acquired title on an estoppel of the grantor.⁷¹

After some vacillation by the Texas courts, it appeared that in 1892 this view would be firmly embedded in Texas law by the case of *Lindsay v. Freeman*,⁷² wherein the Texas Supreme Court, speaking through Justice Tarlton, adopted the viewpoint of *Van Rennselaer* and said:

tance by Deed indented, or Deed poll, (c) by Defeasance, by Deed indented, or Deed poll.

Co. Litt. 352a.

The doctrine is recognized in England as part of the present body of law.

⁶⁹ BIGELOW, ESTOPPEL 384 (5th ed. 1876). In the case of a deed executed by multiple grantors, unless expressly limited, it would appear any after-acquired title of a grantor will pass to the grantee, although in excess of the interest he subjectively intended to convey. See *Germany v. Turner*, 132 Tex. 491, 123 S.W.2d 874 (1939). This would seem especially true if the covenant rationale is applied. See *Keith Lumber Co. v. Houston Oil Co.*, 257 Fed. 1 (5th Cir.), *cert. denied*, 250 U.S. 666 (1919).

⁷⁰ 52 U.S. (11 How.) 325 (1850).

⁷¹ The principle deducible from these authorities seems to be, that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies.

The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it.

⁷² 52 U.S. (11 How.) 325 (1850).

⁷³ 83 Tex. 259, 18 S.W. 727 (1892).

If the grantors, the Lowery sisters, did not possess the estate which the deed purports to convey, nevertheless, as it was their clear intention, shown by the deed, to convey a fee simple, they and their privies, whether in blood, in estate, or in law, are estopped to claim by an after-acquired title, though the deed contains no warranty. The language in the deed whereby the grantors "convey" the fee simple estate in the land constitutes a recital which imports an assertion by them that they are the owners in fee simple of the land; and having thus asserted the fact of their ownership, the grantors are estopped to deny such fact.⁷³

In answering the argument of the appellant's attorney the court further stated:

Appellant, combatting the contention of the appellees, sustained in the views here expressed, uses the following quotation from *Devl. Deeds*, § 945: "In the absence of statutory enactment the general rule is, that the deed must contain a covenant of some kind to cause an after-acquired title to pass by estoppel. In some of the early New York cases it was held that an after-acquired title passed without any covenant; but these cases were subsequently overruled, and the doctrine announced that a subsequently acquired title would not, in the absence of some covenant or stipulation, pass to the grantee." To meet the rule stated, the learned author does not in our opinion mean to indicate that the deed must contain an *express* covenant. If the words of an instrument import an assertion or stipulation of title by the grantor, which he conveys, they imply a covenant which will work the estoppel. That this is the author's meaning appears from the cases cited in support of the text, in nearly all of which the instruments adjudged to be insufficient to preclude the grantor from asserting an after-acquired title are held to be mere quitclaim deeds, or are such as neither express nor imply a covenant.⁷⁴

The court clearly indicates that the presence of an express or implied warranty does not raise an action on the covenant as the basis for after-acquired title, but goes to the nature of the manifested intent of the grantor as to whether or not he purports to convey the land described, or an interest therein, to the grantee. If the grantor does not own the land purported to be conveyed, which he later acquires, he is then estopped to deny that under the deed the grantee now owns the land. Although at common law estoppel by deed only applied to conveyances under seal, this requirement has now become obsolete, at least in Texas.⁷⁵

⁷³ *Id.* at 264, 18 S.W. 727 (citations omitted).

⁷⁴ *Id.* at 265, 18 S.W. 727.

⁷⁵ From time to time a question has arisen whether statutory provisions placed unsealed instruments on the same basis as common law instruments under seal. See *TEX. REV. CIV. STAT. ANN.* arts. 27, 7093 (1925) (Act of 1911, now repealed). Also see the recent case of *Unthank v. Rippstein*, 386 S.W.2d 134 (Tex. 1964).

2. Form of Deed or Other Conveyance

It is commonly stated that a quitclaim deed will not pass an after-acquired title; however, the statement may be generalized to one that the deed must purport to convey a specific interest in the described land.⁷⁶ The question of whether a deed purports to convey a chance of title or an interest in the land is important not only in the after-acquired title cases, but also in cases dealing with the question of the qualification of a grantee as a bona fide purchaser of a later legal title (to cut off prior equities) or as a subsequent purchaser without notice under the recording statutes.⁷⁷ A deed that will not so qualify is normally defined as a quitclaim deed.

A conveyance of all one's "right, title and interest" in and to described property is no more than a quitclaim deed, unless an intent can otherwise be found that title is conveyed.⁷⁸ This is so although

⁷⁶ Halbert v. Green, 156 Tex. 223, 293 S.W.2d 848 (1956); Clark v. Gauntt, 138 Tex. 559, 161 S.W.2d 270 (1942); Threadgill v. Bickerstaff, 87 Tex. 520, 29 S.W. 757 (1895); Harrison v. Boring, 44 Tex. 255 (1875); Manwaring v. Terry, 39 Tex. 67 (1873); Renfrow v. Lineberry, 271 S.W.2d 440 (Tex. Civ. App. 1954) *error ref. n.r.e.*; Green v. West Texas Coal Mining & Dev. Co., 225 S.W. 548 (Tex. Civ. App. 1920) *error ref.*; Hopkins v. Walters, 224 S.W. 516 (Tex. Civ. App. 1920); Breen v. Morehead, 126 S.W. 650 (Tex. Civ. App. 1910), *aff'd*, 104 Tex. 254, 136 S.W. 1047 (1911); Culmell v. Barroum, 35 S.W. 942 (Tex. Civ. App. 1896) *error ref.*, 90 Tex. 93, 37 S.W. 313 (1896); Bedford v. Rayner Cattle Co., 35 S.W. 931 (Tex. Civ. App. 1896).

⁷⁷ Richardson v. Levi, 67 Tex. 359, 3 S.W. 444 (1887); Houston Oil Co. v. Niles, 255 S.W. 604 (Tex. Comm. App. 1923). Also see 2 LANGE, LAND TITLES § 484 (1961).

⁷⁸ For instance see Clark v. Gauntt, 138 Tex. 559, 161 S.W.2d 270 (1942); Threadgill v. Bickerstaff, 87 Tex. 520, 29 S.W. 757 (1895); Harrison v. Barroum, 44 Tex. 255 (1875). It has been thought that the classification of an instrument as a quitclaim deed was the same in case of qualification of a subsequent purchaser, etc. as to pass on after-acquired title. *But see* Bryan v. Thomas, 365 S.W.2d 628 (Tex. 1963), where a purchaser of "all of our undivided interest" in and to all of the oil, gas, and other minerals in and under a described tract of land was deemed a bona-fide purchaser for value without notice. The case is similar to Green v. West Texas Coal Mining & Dev. Co., 225 S.W. 548 (Tex. Civ. App. 1920) *error ref.* Both cases seem clearly erroneous on the question of not classifying the conveyance as a quitclaim deed.

A good discussion of whether a deed is a quitclaim deed or purports to convey title is found in Cook v. Smith, 107 Tex. 119, 122-23, 174 S.W. 1094 (1915):

The character of an instrument, as constituting a deed to land or merely a quit claim deed, is to be determined according to whether it assumes to convey the property described and upon its face has that effect, or merely professes to convey the grantor's title to the property. If, according to the face of the instrument, its operation is to convey the property itself, it is a deed. If, on the other hand, it purports to convey no more than the title of the grantor, it is only a quit claim deed. Richardson v. Levi, 67 Tex. 364, 3 S.W. 444; Threadgill v. Bickerstaff, 87 Tex. 520, 29 S.W. 757. The intention of the instrument is to be confined, of course, to that which its terms reveal; but it should be considered in its entirety, and if, taken as a whole, it discloses a purpose to convey the property itself, as distinguished from the mere title of the grantor, such as it may be, it should be given the effect of a deed, although some of its characteristics may be those of a quit claim deed. The use of the term "quit claim" is not, of itself, a conclusive test of its character. It may make use of that term and yet have the effect of a conveyance of the property. Garrett v. Christopher, 74 Tex. 453, 12 S.W. 67, 15 Am. St. Rep. 850; Richardson v. Levi, *supra*.

The granting clause of the deed from Potts to Neff, "have bargained, sold,

the deed contains a covenant of warranty, as it has been long held that a clause of warranty will not enlarge the grant.⁷⁹ Normally such intent must appear on the face of the instrument, however, at least one case has indicated that intent may be found from extrinsic factors such as whether the grantee paid full market value. Some early courts erroneously found such intent in the presence of the habendum⁸⁰ clause; however, this view was later rejected.⁸¹

More difficult constructional questions have arisen concerning the effect of recitals contained in a deed otherwise purporting to convey the land.⁸²

released and forever quit claimed, and by these presents do hereby bargain, sell, release and forever quit claim, unto the said A. A. Neff . . . all my right, title and interest in and to that certain tracts or parcels of land," and the habendum clause, as well, "to have and to hold the said premises, together with all and singular the rights, privileges and appurtenances thereto in any manner belonging to the said A. A. Neff and his heirs and assigns forever, so that neither I, the said R. Potts, nor my heirs nor any person or persons claiming under me, shall at any time hereafter have, claim or demand any right or title to the aforesaid premises or appurtenances or any part thereof," are essentially in the terms of a quit claim deed. If the character of the instrument were dependent alone upon the construction of these parts of it, there could be no doubt, under the authority of *Threadgill v. Biokerstaff*, supra, and *Hunter v. Eastham*, 95 Tex. 648, 69 S.W. 66, of its being simply a quit claim deed, since these clauses are in substantially the same terms as the granting and habendum clauses of the respective instruments reviewed in those decisions and there held to be quit claim deeds.

But the presence in the deed from Potts to Neff of the clause, "and it is my intention here now to convey to the said A. A. Neff all the real estate that I own in said town of Paducah, whether it is set out above or not," cannot be overlooked. It discloses very plainly, we think, that the grantor's intention in the execution of the instrument was to convey all of the property situated in the town previously described, and any other property there owned by him which was not described.

⁷⁹ See *Wilson v. Wilson*, 118 S.W.2d 403 (Tex. Civ. App. 1938).

⁸⁰ *Bell v. Gaines*, 237 S.W. 346 (Tex. Civ. App. 1922); *Bedford v. Rayner Cattle Co.*, 35 S.W. 931 (Tex. Civ. App. 1896); *Garrett v. Christopher*, 74 Tex. 453, 12 S.W. 67 (1889).

⁸¹ *Culmell v. Borroum*, 35 S.W. 942 (Tex. Civ. App. 1896) *error ref.*, 90 Tex. 93, 37 S.W. 313 (1896).

⁸² The question appears also as to construction of deeds passing present title.

It should be noted that if two clauses in a deed are ambiguous, as to the estate granted, they will be construed in favor of the grantee and pass the greatest estate either will permit, and the other will be rejected, *Cartwright v. Trueblood*, 90 Tex. 535, 39 S.W. 930 (1897); *Rio Bravo Oil Co. v. Staley Oil Co.*, 138 Tex. 198, 158 S.W.2d 293 (Tex. Comm. App. 1942), *affirming* 138 S.W.2d 838 (1940).

(a) In *Rettig v. Houston West End Realty Co.*, 254 S.W. 765 (Tex. Comm. App. 1923), *affirming* 241 S.W. 614, grantor inherited the interest of his mother and brother in a tract of land and executed a deed containing the following recitations:

Know all men by these presents, that I, Taylor Harris, only child and sole heir of Martha Harris, deceased, * * * have granted, sold and conveyed, and by these presents do grant, sell and convey under the said John T. Tullock all of my right, title and interest, *being an undivided one-half interest inherited as sole heir of Martha Harris*, in and to the following described land and premises, to-wit: 25 acres of land [describing the John Harris tract by metes and bounds]. (Emphasis added.)

254 S.W.2d at 768.

The court stated:

The statement that it was the "one-half interest inherited as sole heir of

Consider for example the effect of the following recital which might be contained in a deed as part of the description of the land conveyed: "to the place of beginning, the land herein conveyed being all of the interest of the grantors, in and to said above described tract of land and which was inherited by them from their mother, and also from their father."

At the time of conveyance an undivided interest in the property is owned by grantor's brother, which thereafter passes to grantors by descent and distribution upon his death.

The Texas cases state a simple test (application being a different story) from which to determine if after-acquired title will pass: Does the deed, looking at it as a whole, convey the land, or merely indicate an intention to convey only the presently owned interest, or property acquired from a specific source. Clauses construed as indicating only the source of title have been interpreted as not restricting the granting clause, and the deed will operate to estop the grantor from claiming later-acquired interests or interests obtaining from a differ-

Martha Harris" merely indicates the source of title, and is not a limitation or restriction on the interest conveyed, as the deed passed not only this particular interest, but all right, title and interest. . . . If it be conceded that there is ambiguity in the deed, and this is susceptible of two constructions, that one will be adopted which is most favorable to the grantee.

Ibid.

It was held that the deed passed all interest of the grantor up to a one-half undivided interest and included the interest inherited prior to the deed, from the grantor's brother.

(b) In *Germany v. Turner*, 132 Tex. 491, 123 S.W.2d 874 (Tex. Comm. App. 1939), the surviving wife and purported sole heirs of decedent granted, sold, and conveyed all of a certain tract of land described by metes and bounds, by general warranty deed. It was subsequently discovered that the deed bore forged signatures of some of the heirs. In a suit in trespass to try title it was held that where there was no limitation or exception on the general warranty that the co-grantors were joint and severally liable on the warranty to the extent of the whole interest conveyed. The court further held that the recitation that grantors were the surviving wife and heirs of the former owner was a mere indication of the source of title and not a limitation upon the granting clause and rejected the contention of surviving wife that she was only conveying her individual interest in the tract described.

The court stated:

If in this instance the recitals in the premises be given the effect of limiting the estate conveyed to only the individual undivided interest of the grantors, then the premises are unquestionably in direct conflict with the granting, habendum and warranty clauses. This conflict can be avoided or resolved by giving to the recitals a construction that they are merely *descriptio personae*, . . . or were intended to refer to the source or history of title, and were not intended to create a limitation upon the quantity of the estate conveyed.

123 S.W.2d at 877.

(c) In *Spangler v. Spangler*, 42 S.W.2d 826 (Tex. Civ. App. 1931), a child inherited a 1/24 interest in certain lands upon his father's death, but prior to the death of his mother conveyed an undivided 1/12 interest by a deed containing the following clause: "It being my intention to convey all my interest in and to said tracts of land by reason of being a child and legal heir of my father."

Subsequent to this deed grantor's mother died and he inherited an additional 1/24 interest. It was held that the above clause limited the grant to the interest inherited from the father, *i.e.*, a 1/24 interest, and that the interest subsequently acquired from the mother did not pass to the grantee.

ent source.⁸³ However, a clause manifesting an interest to pass title to property from a particular source or interest will have the effect of limiting the grant and estoppel will not arise.⁸⁴ As indicated in the above example, most confusing are deeds containing reference to land acquired by descent or devise. Although little can be done as to existing conveyances (except litigation), this is a drafting problem that should not be ignored and the draftsman should use care as to the form of recitals included.

Not only do references to source cause plentiful headaches as to intent, the same problems can result from the effort of a draftsman to shore up a deed description by including indiscriminate references to prior recorded deeds. Consider the following chain of title: O to A purporting to convey Blackacre; A to B purporting to convey an undivided one-half interest in Blackacre; and, B to C purporting to convey Blackacre. X as attorney for D (proposed purchaser from C) draws a deed based upon a new survey and, in an attempt to remove possible ambiguities caused by variations in prior descriptions, includes the recital "being the same land *conveyed* by A to B etc." If C later acquires A's remaining one-half interest it will not pass to D, as the granting clause has been modified by the reference back to B's deed.⁸⁵ The reference is to the interest conveyed to B which was only

⁸³ Retig v. Houston West End Realty Co. and Germany v. Turner, note 82 *supra*. Also see Duhig v. Peavy-Moore Lumber Co., 135 Tex. 508, 144 S.W.2d 878 (1940); Cartwright v. Trueblood, 90 Tex. 535, 39 S.W. 930 (1879); West v. Herman, 104 S.W. 428 (Tex. Civ. App. 1907). A recent case in which it can be argued the recitation should have been given effect is Burns v. Goodrich, 392 S.W.2d 689 (Tex. 1965).

⁸⁴ Spangler v. Spangler, 42 S.W.2d 826 (Tex. Civ. App. 1931); Wilson v. Wilson, 118 S.W.2d 403 (Tex. Civ. App. 1938).

⁸⁵ This type of situation has caused headaches more than once in the oil and gas area, as well as in other areas of the law. For instance:

- (a) In King v. First National Bank of Wichita Falls, 144 Tex. 583, 192 S.W.2d 260 (1946), a reference in a reservation clause in a deed to the land "hereinabove described" was held to refer to the entire fee rather than the undivided interest conveyed.
- (b) A contrary result was reached in Hooks v. Neill, 21 S.W.2d 532 (Tex. Civ. App. 1929) *error ref.*, where reference back was to premises "herein described and conveyed."
- (c) In Harris v. Windsor, 156 Tex. 324, 294 S.W.2d 798 (1956), a reference following a metes and bounds description: "and being the same land described in warranty deed . . . to which reference is made for all purposes" where former deed conveyed a lesser undivided interest held to limit the granting clause to the interest conveyed by the former deed. Note that if the reference back had not been for "all purposes" it would not have had a limiting effect.
- (d) In Sharp v. Fowler, 151 Tex. 490, 252 S.W.2d 153 (1952), an interesting fact situation occurred. In effect the transaction was: (i) O to A deed of Blackacre with reservation of all the minerals to O, (ii) O to A all the minerals from Blackacre, (iii) A to X, an undivided $\frac{3}{4}$ of the minerals from Blackacre, and (iv) A to B, a deed describing Blackacre with a reference back stating "being the same land described in [deed (i)]." Query who owned the remaining $\frac{1}{4}$ mineral interest? Held: Although deed (i) only operated to convey the surface and not the minerals in Blackacre, the reference back was to the physical dimensions of the land and not to the interest conveyed. B won.

an undivided one-half interest.

The form of the recital also may create a situation in which after-acquired title might pass where not subjectively intended by the grantor.⁸⁶ In the above hypothetical situation *A* in his deed to *B* could make a reference back as "being the same property described in the deed from *O* to *A*" which may be construed as enlarging the granting clause to include the entire interest.

Obviously if the draftsman⁸⁷ feels called upon to incorporate descriptions from deeds appearing in the prior chain of title, the recitations should be so limited, *i.e.*, "reference is here made to the metes and bounds description of said land as contained in the ded from *A* to *B* and for no other purpose," and intentions should be clearly set forth where references to limit the property conveyed as to source, interest, or quality are desired.

G. Remote Grantees

The so-called doctrine of inurement deals with the question of remote grantees who will benefit by or acquire a grantor's after-acquired title.⁸⁸ Early cases⁸⁹ in the United States treating after-acquired title as an incident to an enforceable covenant of warranty were met by the rule of law that a chose in action was non-assignable and therefore only the immediate grantee and not his remote successors would have a right to acquire the after-acquired title.

Although the early Texas cases often applied a covenant theory to pass an after-acquired title, in only a few of the cases did the

⁸⁶ *Sharp v. Fowler*, note 85 *supra*.

⁸⁷ Since deliberate (or inadvertent) use of reference words like "described," "convey," "for all purposes," etc. may cause or alleviate (as the case may be) a breach of warranty on the part of the grantor, the draftsman and interested parties should use due caution in the preparation and examination of instrumentation of real property transactions to determine that they reflect the true intent of the parties. It would seem the phrase "weasel words" is an unfortunately apt definition of words as these.

⁸⁸ The AMERICAN LAW OF PROPERTY § 15.21, at 847-48, states the doctrine of inurement as follows:

[I]t must be considered on the basis of decisions or dicta to be the rule in most states that a conveyance which will create an estoppel to assert an after-acquired title will transfer it and vest the legal title in the grantee or his successors. . . . It is said that the title vests by operation of law, or by inurement, as soon as it is acquired by the grantor, without the need of judicial assistance. Where the doctrine is in force, as now appears to be the case in most states, it applies irrespective of how the subsequent title is acquired other than from the grantee or those claiming under him and regardless of whether the grantor assumed to convey that which he did not own by mistake or by fraud. It operates not only in favor of the grantee but for the benefit of any person claiming title under him by any form of transfer, and binds not only the grantor but his heirs or donees and also purchasers from him who have notice of the conveyance which gives rise to the right.

⁸⁹ *Lewis v. Ridge*, Court of Common Pleas, Cro. Eleg. 863 (1601), *Jordan v. Chambers*, 226 Pa. 573, 75 A. 956 (1910). Also see discussion and cases called in RAWLE, ch. 11, and BIGELOW, ESTOPPEL, ch. 11 (5th ed. 1876).

court discuss the manner in which a remote grantee acquired the right. The statement is merely made that parties to the deed and their privies of estate and blood are bound as to any after-acquired title, which passes "eo instanti" to the remote grantee.

The common law rule prohibiting assignment of choses in action has never been in force in Texas,⁹⁰ and, indeed, no case dealing with after-acquired title makes reference to the rule. Although the right to acquire an after-acquired title was sometimes treated as a contractual right passing to remote grantees by successive assignment, the courts have not discussed the question of the form necessary to assign the chose. If treated merely as a personal right it would not pass under a deed dealing only with land, and a separate assignment would be necessary. However, it is implicit in the warranty cases that any instrument sufficient to purport to convey the land also effects an assignment of the chose. It may be therefore concluded that this contractual right is deemed to be sufficiently "concerned" with the land as to be considered an incorporeal interest in land so as to pass under the terms of a deed.

The early courts were momentarily concerned with the nature of the right that the remote grantee acquired, and some cases like *Gould v. West*,⁹¹ the court partially basing its decision on the covenant of further assurance, notes that equity would bind the heirs to make further assurance, indicating that the right is in the nature of specific performance to compel a conveyance. Such result would be consistent with the covenant approach. However, by 1897 in *Baldwin v. Root* the court indicated otherwise.⁹²

⁹⁰ *Lakeview Land Co. v. San Antonio Traction Co.*, 95 Tex. 252, 66 S.W. 766 (1902); *Cleveland v. Heidenheimer*, 92 Tex. 108, 46 S.W. 30 (1898); *Ogden v. Slade*, 1 Tex. 13 (1874); *Hale v. Hollon*, 36 S.W. 288 (Tex. Civ. App. 1896), *aff'd*, 90 Tex. 427, 39 S.W. 287 (1897).

⁹¹ 32 Tex. 339 (1869).

⁹² 90 Tex. 546, 40 S.W. 3, 5-6 (1897):

There is considerable conflict in the authorities upon the question whether the title acquired by one who had previously conveyed the same land with covenants of warranty vests in the warrantee at the time that such title is subsequently acquired by the warrantor, or gives a right to the warrantee to have the subsequently acquired title transferred to him. This conflict grows largely out of the technical rules of the common law upon the subject of covenants in the different kinds of conveyances; which rules are in force in some jurisdictions and in others they are not, and the decisions upon this question in the different courts depend largely upon whether the technical rules referred to are observed by the court or disregarded. In this State the subject is regulated by statute, so far as the covenants which the law implies from the use of certain language are concerned. The rule most consistent with our system of laws upon this subject is that when one conveys land by warranty of title or in such manner as to be estopped to dispute the title of his grantee, a title subsequently acquired to that land by the grantor will pass eo instanti to his warrantee, binding both the warrantor and his heirs and subsequent purchasers from either.

When the court applies an estoppel basis for passing after-acquired title, the right of the grantee is derived from the inability of the original grantor, or his privies, to claim title under the instrument executed. An after-acquired title not subject to claim by the grantor vests immediately in the grantee or his successors.

Differences exist as to enforceable rights of a person having only a contractual right to acquire land and one owning either an equitable or legal title. The former has only a right of specific enforcement which may be subject to the four-year statute of limitations as to the time in which such actions may be brought; on the other hand, the latter's right is to sue for title, generally by a suit in trespass to try title, which title is subject to being lost only under the three, five, ten, or twenty-five-year adverse possession statutes.⁹³ These and other differences could have been significant in the after-acquired title situation, as they had been in other areas; however, *Baldwin* extinguished the possible differences based on rationale and the right of a grantee is apparently one for title, subject to the adverse possession statutes, and amenable to a suit in trespass to try title.

Consider the following situation: O conveys to A, at a time when a one-half interest is outstanding in X. A conveys to B. B quitclaims to C. O acquires X's interest.

What is the position of remote grantee C to acquire a right to after-acquired title through a quitclaim deed from B? If the grantor of the quitclaim deed B is considered to own a contractual right, (*i.e.*, warranty cases) to acquire an after-acquired title, such chose in Texas is impliedly considered as an incorporated interest in the land so as to pass under the terms of the quitclaim deed.

However, if an estoppel theory is used, does the right of B to O's after-acquired title pass to C? It may be contended once a right

⁹³ See text accompanying note 6 *supra*. Cf. *Deaton v. Rush*, 113 Tex. 176, 252 S.W. 1025 (1923) (equitable right); *Covey v. Knight*, 215 S.W.2d 684 (Tex. Civ. App. 1948) (equitable title); and TEX. REV. CIV. STAT. ANN. arts. 5518 and 5535 (1925).

The nature of a grantee's right to an after-acquired title will determine the form of action used to acquire such title and the limitation period in which such right may be lost. If O has no title and A is deemed to have an equitable right to acquire an after-acquired title of A, A will have four years, from the time A knew or should have learned of O's acquisition, to sue for specific performance of his contract right. Article 5829. However, this statute is tolled by certain disabilities, including coverture. Article 5535. A's right can not be lost by adverse possession under the three, five, or ten-year statutes, for until the contractual right is enforced, no "cause of action shall have accrued" to A as required under these statutes. A may lose his right under the twenty-five-year statute. Article 5519. However, the cases construing the statute have been inconsistent. Whitaker, *The Twenty-Five Year Statute of Limitations*, 10 BAYLOR L. REV. 196 (1958).

If A sues in trespass to try title he will surely lose, for until title is acquired by A he cannot support the action.

On the other hand if title (legal or equitable) passes to A, by estoppel or equitable conversion, he may sue directly in trespass to try title and is not subject to the above mentioned four-year statute of limitation.

of after-acquired title is created in *B* by estoppel that the right of inurement to *C* is in the nature of a chose in action and is an assignable right by quitclaim deed.⁹⁴

However, can it be argued that if *B* later acquires the interest by conveyance from *X* that it will pass to *C*? Surely not on an estoppel basis, for *B* has never purported to convey the land to *C*. It should follow logically that *C*'s right would not be strengthened if *B* acquires the remaining interest by inurement from *O*. Under the estoppel rationale a grantee's right, if any, depends upon a denial of the grantor to claim rather than the creation of an enforceable contractual right in the grantee. The latter may be assignable as a chose in action but it is hard to reach the same conclusion as to the former.

III. AFTER-ACQUIRED TITLE AND THE TEXAS RECORDING ACTS

A. Operation of the Recording Acts

It is a familiar rule of common law that a later purchaser of a legal title will take free of undisclosed equities. Assume that *O* conveys to *A* by deed purporting to convey Blackacre (which *A* does not record) at a time when *O* does not have title, but which he later acquires. Under the covenant theory *A* would have a right of specific performance against *O*. However, if *O* later conveys Blackacre to *B* for value without actual notice of *A*'s deed, *B* by acquiring legal title will cut off *A*'s equitable right to acquire title.⁹⁵

However, if the court proceeds on a theory of estoppel (or, on a contractual theory where it is held that upon *O* acquiring title, by equitable conversion it passes to *A*)⁹⁶ *A* would have at least an equitable title, and since it is now embodied in the prior deed it may be

⁹⁴ Few Texas cases are found on the question, but those on point indicate that after-acquired title will inure through a later quitclaim deed without discussion of rationale.

Henderson v. Little, 248 S.W.2d 759 (Tex. Civ. App. 1952) *error ref. n.r.e.*, stated that after-acquired title passes from the grantor acquiring such title and all in privity with grantor likewise are estopped to deny the recitals in the grantor's deed, *Box v. Lawrence*, 14 Tex. 545 (1855), states that recitals in a deed binding both parties thereto and their privies "in blood, in estate, and in law," to same effect *Hardy v. DeLeon*, 5 Tex. 211 (1849), states that after-acquired title is based on estoppel and exists in all cases as against a grantor and subsequent purchasers from him with notice that of the prior conveyance.

The case of *Saunders v. Flanniken*, 77 Tex. 662, 14 S.W. 236 (1890), contains dicta to the effect that after-acquired title will pass through a quitclaim deed to a remote grantee and, although such a fact situation was involved in this case no discussion of the point was made. The case of *Barfield v. Belcher Land Mortgage Co.*, 257 S.W. 1095 (Tex. Comm. App. 1924), implies that a valid quitclaim deed will pass after-acquired from a former warranty deed and that the right of inurement will pass through the quitclaim deed.

Few cases have been found either discussing the situation or containing a situation where the facts involved the right of inurement to remote grantees; however, no Texas cases have been found denying such a result.

⁹⁵ *Coker v. Roberts*, 71 Tex. 597, 9 S.W. 665 (1888); *Reeves v. Shook*, 225 S.W. 429 (Tex. Civ. App. 1920).

⁹⁶ *Ackerman v. Smiley*, 37 Tex. 211 (1872).

treated as legal. This apparently is the result in Texas in covenant rationale cases subsequent to *Baldwin v. Root*.

Articles 6626⁹⁷ and 6627⁹⁸ deal with the effect of recording of certain written instruments dealing with real property in Texas. Briefly article 6626 enumerates a wide variety of instruments affecting real property that may be recorded. Recording under this article merely gives notice to persons of the existence of the instrument, but does not change the effect at common law.

Article 6627, however, has the important result of changing the common law effect upon recordation of instruments enumerated in the statute. For instance, at common law if X conveyed legal title to Y by deed, which was not recorded, and X subsequently conveyed legal title by deed to Z, a bona fide purchaser for value without notice of Y's deed, Y would prevail, as the purchaser of later legal title could not cut off a prior legal title, recorded or not. Likewise it was held that M, a judicial creditor, could catch by his lien only the interests owned by a debtor at the time the lien was affixed, and M would not catch land conveyed by prior unrecorded deed to L. By article 6627 it was made possible for Z by deed and M by affixing his lien to take free of unrecorded conveyances of legal title, contrary to the common law result. However, if an interest is construed as not being within the scope of article 6627 (as are certain equitable interests), the common law rules of priority will still apply.⁹⁹

It therefore follows that in the first example, regardless of the theory of the court as to the nature of A's rights to after-acquired title, if A does not give notice to B of A's prior conveyance, B may prevail. If A's right is treated as an equitable right to acquire title, B may win as a bona fide purchaser of the legal title without notice of the prior equity; or if A's right is treated as becoming legal, upon O's later acquisition of title, A may lose his prior legal title by virtue of article 6627.

⁹⁷ TEX. REV. CIV. STAT. ANN. art. 6626 (1960).

⁹⁸ TEX. REV. CIV. STAT. ANN. art. 6627 (1960):

When sales, etc., to be void unless registered. All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding.

⁹⁹ *Shear v. Currie*, 295 F. 841 (5th Cir. 1924), (vendor's lien); *Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925) (oral express trust); *Blankenship v. Douglas*, 26 Tex. 225 (1862) (resulting trust). *But cf.*: *Bowles v. Belt*, 159 S.W. 885, (Tex. Civ. App. 1913) *error ref.* (vendor's lien).

On the other hand, *B* may take subject to *A*'s prior conveyance if he has actual notice thereof or is charged with constructive notice by reason of *A*'s occupancy and possession. Constructive notice may normally also be given by a grantee recording his deed; however, in the factual context of after-acquired title a serious question arises as to the effect of *A*'s recording his deed from *O*.

B. The Scope Of Search Doctrine As Limiting The Effect Of The Recording Acts

If *A* records after the record reflects *O* to have acquired title and before *B* buys, there should be no question that *B* is subject to *A*'s deed. What, however, if *A* records, but before *O* acquires a title? The question has been authoritatively answered in Texas only in the instance where the grantor *O* is the sovereign.¹⁰⁰

Most jurisdictions have enacted statutes declaring the effect of a properly recorded instrument, in so far as it may thereafter operate to charge persons with notice of the contents of the instrument. In Texas, article 6646 declares that a properly recorded instrument shall be "notice to all persons of the existence of such grant, deed, or instrument."

The obvious question is whether the statute means what it says. For instance, is *E* in Maine charged with notice of recorded instruments affecting title to Blackacre in Texas? The answer is that "it depends." On what? Generally it depends upon whether *E* is dealing with the title to Blackacre. If so, is *E* charged with notice of all recorded instruments appertaining to Blackacre? Assume in the chain of title we find the situation where *R* has conveyed to *S* who did not record, and *S* conveyed to *T*, who did record. Is *E*, a prospective purchaser from *R*, charged with notice of the senior chain of title? The obvious answer to the stated obvious question is that the statute does not mean what it says, or rather it has been judicially glossed so that the statute concludes only those persons dealing with instruments that may be easily found as to a particular title. This judicial limitation of the notice statute is commonly referred to as the "scope of search" or "chain of title" doctrine.

A literal application of the latter phrase will result in a rather mechanical approach leading to the result that a recorded instrument

¹⁰⁰ *Borroum v. Culmell*, 90 Tex. 93, 37 S.W. 313 (1896); *Gould v. West*, 32 Tex. 339 (1869); *Williams v. Cook*, 282 S.W. 574 (Tex. Comm. App. 1926); *Houston Oil Co. v. Reese Corcher Lumber Co.*, 181 S.W. 745 (Tex. Civ. App. 1916) *error ref.*; *Breen v. Morehead*, 126 S.W. 650 (Tex. Civ. App. 1910), *aff'd*, 104 Tex. 254, 136 S.W. 1047 (1911); *Von v. Denson*, 120 S.W. 1020 (Tex. Civ. App. 1909); *Simon v. Stearns*, 43 S.W. 50 (Tex. Civ. App. 1897), *error ref.*; *Dupree v. Frank*, 39 S.W. 994 (Tex. Civ. App. 1897).

will not be notice to subsequent purchasers (herein used to denote all persons who may later deal with the title) unless it can be "connected" with the title. The "no lead-in" example above exemplifies this result.

On the other hand, the first phrase implies that a subsequent purchaser is concluded by notice of recorded instruments only if he is bound to search for them. Conversely stated, if it be decided that the recording of an instrument shall constitute notice to subsequent purchasers, they are bound to search for it. This is well stated by the supreme court in the case of *Leonard v. Benford Lumber Co.*¹⁰¹

The literal terms of articles 6842 and 6857 would require that all persons be held to know what appears on the face of a duly recorded instrument. However, our statutes bear a settled construction, under which registration of an instrument carries notice of its contents only to those bound to search for it, among whom are subsequent purchasers under the grantor in the recorded instrument.

The difference between the "no lead-in" deed and the prior recorded deed of A in the after-acquired title situation is that with reference to the official records (*i.e.*, county clerks office etc.) the "no lead-in" deed cannot be found even if searched for, although the same is not true with the deed from O to A. The reason for this, of course, is due to the fact that deed and related records are indexed alphabetically by grantor and grantee names, and not by property description. This means to find the conveyances out of O, one must start with the date upon which O finally parted with title (or the present date if he still owns it) and search backwards chronologically, in the "reverse" or "grantee" index to deeds until the deed into O is found. One then switches to the "direct" or "grantor" index under O's name, as of the date of the deed into O,¹⁰² and searches O as a grantor chronologically forward to the date O divested¹⁰³ himself of title.

¹⁰¹ 110 Tex. 83, 216 S.W. 382, 384 (1919).

¹⁰² The execution date of the deed, not the date of recordation.

¹⁰³ Since recordation of an instrument by one in the junior chain of title cannot constitute constructive notice to the senior chain, *White v. McGregor*, 92 Tex. 556, 50 S.W. 564 (1899), the forward point of search as to any grantor would be the date of recordation of title out of any such grantor. As a practical matter the forward point of search as to each grantor is the date of search. This does not arise from any constructive notice by an instrument recorded after the deed out of the grantor, but is due to the fact that under article 6627 the junior chain taker does not have to record to win.

For example: O conveys to A who waits three days to record and in the interim O sells to B who takes for value without actual notice of the deed to A. As article 6627 is a "notice" type recording statute rather than a "race" or "grace period" type statute, B wins. B then waits four years and records. Any attorney examining the records for a proposed purchase from A must look for a possible deed to B. *Houston Oil Co. v. Niles*, 225 S.W. 604 (Tex. Comm. App. 1923). The recording by B adds nothing in perfecting his title as to A (it stops O from selling to C) but, if found, notifies the attorney A has no title. Although this situation depends on a hiatus between delivery of A's deed and recordation, most titles

Obviously the "no lead-in" deed of *S* to *T* will never be found from these indices, unless one knows about the deed from *R* to *S*. Also, unless one searches the grantor index for deeds out of *O* prior to the date *O* acquired title, the prior recorded deed of *A* will never be found.

Assuming that our hypothetical purchaser has a premonition of *A*'s deed and wishes to search for it, how far back must he look? To this question there is no answer, how old is *O*? From a practical standpoint a period of some thirty to fifty years should be searched in order to give a feeling of security.

It is at this point that the wording of article 6646 and the so-called scope of search doctrine collide. Since the deed from *O* to *A* can be found, should it be looked for? Article 6646 says "yes." However, as this would apply to each grantor in the chain of title, would this not constitute a practical impossibility viewed with relation to the manner of indexing and search of the official records?

As mentioned above, the Texas courts have authoritatively solved this conflict only in regard to the factual situation of title out of the State of Texas. It has been repeatedly held that a subsequent purchaser need not search for instruments as to particular land recorded prior to the origin or inception of title from the sovereign. These include cases of deeds made and recorded prior to the date of issuance of land certificates subsequently located on and patent issued to the land described;¹⁰⁴ prior to entry of *H* and *W*, where land later is acquired under homestead laws;¹⁰⁵ prior to the execution of an application to purchase state lands,¹⁰⁶ etc. It is obvious that these cases constitute a further gloss on the wording of article 6646, for the prior conveyance in each instance could be found.

contain many such instruments. Again an abstract of title, indexed by land description, will contain *B*'s deed.

Although deeds recorded in the junior chain are not constructive notice to later purchasers in the senior chain, the interaction of after-acquired title and the recording acts has produced some weird results. In the case of *Caswell v. Llano Oil Co.*, 120 Tex. 139, 36 S.W.2d 208 (1931), *O* executed a deed of trust to Bank, recorded; then he executed an oil and gas lease, recorded; the deed of trust was foreclosed to *X* who sold to *O*; *O* then sold to *Y*. The recordation of the lease was held to be constructive notice to *Y*. This results from the senior chain after-acquired title being fed to the lessee upon *O*'s reacquisition. It can be strongly argued that if the lease were unrecorded the lessee should have an option whether to accept the later title, where the effect is to switch lessee's chain of title from junior to senior, for here if the lease were unrecorded *Y* would win!

No cases are found in Texas dealing with the election of the grantee to accept the after-acquired title, and, of course, if the courts treat the right of inurement as a rule of property no right of election would exist.

¹⁰⁴ *Breen v. Morehead*, 126 S.W. 650 (Tex. Civ. App. 1910), *aff'd*, 104 Tex. 254, 136 S.W. 1047 (1911).

¹⁰⁵ See *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S.W. 382 (1919), and cases cited therein.

¹⁰⁶ *Simon v. Stearns*, 43 S.W. 50 (Tex. Civ. App. 1897) *error ref.*

C. Breen v. Morehead and Progeny

The unsettled question in Texas is whether the scope of search doctrine will be applied to conveyances in the derivative title. Although Texas has been cited as answering this question "yes," the authority cited is *Breen v. Morehead*,¹⁰⁷ which factually dealt with conveyances out of the sovereign. Few Texas cases have been found dealing with the question and it may never be answered. Abstractors generally prepare the index of instruments to be included in an abstract from their own records of instruments, which are posted or filed chronologically by property description. Due to the different manner of search, O's prior deed to A would be included in the abstract (as in fact would the "no lead-in" instruments) so that a purchaser relying on an abstract examination would have actual notice of these instruments.

However, be that as it may, the rule elsewhere is generally that one need not search for conveyances, etc. made by a grantor prior to the date it is shown that he acquired title.¹⁰⁸

The early Texas case of *Hale v. Hollon*¹⁰⁹ would not so restrict the operation of what is now article 6646, and in answering the question of practical impossibility the court of appeals stated:

We do not think that the duty of search for incumbrance or deed commences at the time of inheritance of title in the vendor, as was held in *Calder v. Chapman*, 52 Pa. St. 359, when the prior deed was with warranty, and binding upon the vendor and his privies. It may be troublesome to search the records, but that would not excuse a want of search when the statute authorized the recording of the conveyance. The statute authorizing its registration, the consequences of registration must follow, in favor of the vendee who is vigilant and complies with the law.¹¹⁰

Strangely this case has been neither cited nor followed on this point. The leading case in Texas on this issue is the above mentioned case of *Breen v. Morehead*,¹¹¹ which dealt with title out of the sovereign. However, the language of both the court of civil appeals and the supreme court is broader than the decision. The lower court stated:

It is the rule that, if the subsequent purchaser of an after-acquired title has received no notice of the prior deed, the estate in his hands is

¹⁰⁷ *Breen v. Morehead*, 126 S.W. 650 (Tex. Civ. App. 1910), *aff'd*, 104 Tex. 254, 136 S.W. 1047 (1911).

¹⁰⁸ See case collected III AMERICAN LAW OF PROPERTY, § 15.22, at 850 nn. 6-8.

¹⁰⁹ 36 S.W. 288 (Tex. Civ. App. 1896), *aff'd*, 90 Tex. 427, 39 S.W. 287 (1897).

¹¹⁰ *Hale v. Hollon*, 36 S.W. at 288 (Tex. Civ. App. 1896).

¹¹¹ *Breen v. Morehead*, 126 S.W. 650 (Tex. Civ. App. 1910), *aff'd*, 104 Tex. 254, 136 S.W. 1047 (1911).

freed from the estoppel. *Shaw v. Beebe*, 35 Vt. 205; *Thistie v. Buford*, 50 Mo. 278; *Rawle Cov. Til.* 427. But the question whether the registration of the prior deed, before the title had been acquired by the grantor and recorded, is constructive notice of estoppel, seems to be a doubtful one. It is said by Mr. Tiedeman on Real Property, § 515: "It is certainly in violation of the spirit of the registration laws, which only require the investigator to search the records for any incumbrance or conveyance which occurs between the time when the grantor acquired the title, and the time when he offers the title for conveyance."¹¹²

The supreme court further comments:

This brings us to the question whether it was the duty of those who bought from McKelligon, without any notice of the deed to Breen for a valuable consideration paid, to look beyond the origin of McKelligon's title to ascertain the fact of previous sale to Breen. The rule of law which governs such transactions is stated thus by Mr. Tiffany in his work on Real Property (volume 1, sec. 476, p. 1080): "A purchaser is not, as a general rule, charged with notice of a conveyance which is of record, even though made by a person in the chain of title, unless it was made by such person after the time at which the records show him to have obtained the title, that is, the purchaser is not bound to search the records to determine whether any particular person in the chain of title, previous to obtaining the title, had done any acts which would affect the title."

Mr. Pomeroy in his *Equity Jurisprudence* (volume 2, § 658, p. 1133) states the same rule in this language: "How far back is a purchaser bound to search the record title of his own vendor? If the records show a good title vested in the vendor at a certain date, and nothing done by him after that time to impair or incumber the title, it would seem that the policy of the registry acts is thereby accomplished; the purchaser is protected; he is not bound to inquire farther back, and to ascertain whether the vendor has done acts which may impair his title prior to the time at which it was vested in him as indicated by the records.

....

Now let us suppose that Mr. Kern had undertaken to investigate the matter as to what might have transpired anterior to the sale by the State to McKelligon. If he must look beyond the origin of the title under which he was purchasing, then how far should he follow that record back in the course of time in order to determine whether McKelligon had made a previous sale of that land? If required to go beyond the origin of the title, there could be no limit short of the vendor's life, and such requirement of purchasers would involve land titles in such uncertainty that it would be impracticable to rely upon any investigation.

We believe that the rule stated above, that the date when the title originated in McKelligon marked the limit of investigation for previous

¹¹² *Breen v. Morehead*, 126 S.W. 650, 656 (Tex. Civ. App. 1910).

sales or incumbrances of that tract of land by McKelligon, should be applied here.¹¹³

There is no doubt that this is dicta expounded beyond the factual context of *Breen*. However, the statements quoted are certainly broad enough to support such an extension; and, it may be argued that the court was making an application, rather than an extension, of what they considered the rule as to vendor's generally, to the State as a vendor.

At least two subsequent cases have in part applied the dicta of *Breen*, one being *First National Bank of Chicago v. Southwestern Lumber Co.*¹¹⁴ which cited *Breen* in support of an opinion where a recorded deed of trust with after-acquired property clause was held inferior to an equitable lien upon later-acquired realty of the grantor (the holding being predicated upon the major rationale of the property being charged with an equitable lien as it came into the hands of the grantor) with the other being *O'Neal v. Terry*¹¹⁵ where the court in a somewhat different fact situation treated a power of attorney in the derivative title as the "inception of title" in construing article 6646.

Since article 6646 is no longer applied in a pristine state, it would seem a slight extension of existing case law (if an extension at all) to apply the scope of search limitation in article 6646 to each grantor in the derivative chain.

The policy of the recording statutes to force men to divulge upon the record all recordable interests claimed in real property is not aided by doctrines giving notice effect to recorded interests not easily found. An equity maxim states that loss between two innocent parties should fall upon the one who could protect himself and did not. Although statutory interpretation is not generally regarded as being in the province of equity, public policies by which statutes are judicially glossed indeed are. A, at the time he acquired title, was charged with notice that record title was not in O. A's protection is to force the recordation of the lead-in deed to O, to complete his chain of title, or, failing this, re-recordation following O's acquisition of title.

¹¹³ *Breen v. Morehead*, 104 Tex. 254, 257, 136 S.W. 1047, 1048-49 (1911).

¹¹⁴ 75 F.2d 814 (5th Cir. 1935).

¹¹⁵ 252 S.W.2d 1006 (Tex. Civ. App. 1952).

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